

No. 89-839-CSY
Status: GRANTED

Title: Arizona, Petitioner
v.
Oreste C. Fulminante

Docketed:
November 17, 1989

Court: Supreme Court of Arizona

Counsel for petitioner: Jarrett, Barbara M.

Counsel for respondent: Trebesh, Dean W., Collins, Stephen R.

Entry	Date	Note	Proceedings and Orders
1	Nov 17 1989	G	Petition for writ of certiorari filed.
5	Nov 17 1989		Appendix of petitioner Arizona filed.
2	Nov 28 1989	D	Application (A89-415) to recall and stay mandate of Supreme Court of Arizona, submitted to Justice O'Connor.
4	Nov 29 1989		(A89-415) Opposition to application to recall and stay mandate, filed by respondent.
3	Nov 30 1989		Application (A89-415) denied by Justice O'Connor.
6	Dec 15 1989		Brief of respondent Oreste C. Fulminante in opposition filed.
7	Dec 15 1989	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	Jan 10 1990		DISTRIBUTED. February 16, 1990
9	Mar 7 1990		REDISTRIBUTED. March 23, 1990
10	Mar 26 1990		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	Mar 26 1990		Petition GRANTED.

12	Apr 11 1990	G	Motion of respondent for appointment of counsel filed.
13	Apr 16 1990		DISTRIBUTED. APRIL 20, 1990.
14	Apr 23 1990		Motion for appointment of counsel GRANTED and it is ordered that Stephen R. Collins, Esquire, of Phoenix, Arizona, is appointed to serve as counsel for the respondent in this case.
18	May 8 1990	G	Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae filed.
15	May 10 1990		Brief amicus curiae of United States filed.
16	May 10 1990		Joint appendix filed.
17	May 10 1990		Brief of petitioner Arizona filed.
19	May 15 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Jun 4 1990		Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae GRANTED.
21	Jun 4 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Jun 12 1990		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
23	Jun 14 1990		Brief of respondent Oreste C. Fulminante filed.
24	Jul 2 1990		CIRCULATED.
25	Jul 13 1990	X	Reply brief of petitioner Arizona filed.
26	Jul 23 1990		SET FOR ARGUMENT WEDNESDAY, OCTOBER 10, 1990. (3RD CASE)

Entry	Date	Note	Proceedings and Orders
27	Sep 17 1990		Record filed.
		*	Certified copy of original record received.
28	Sep 24 1990		Record filed.
		*	Certified copy of original record received.
29	Oct 5 1990		Reporters transcript, 24 volumes, received. (Box).
30	Oct 10 1990		ARGUED.

89-839

Supreme Court, U.S.

FILED

NOV 17 1989

JOSEPH F. SPANGLER
CLERK

NO. 89-_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

STATE OF ARIZONA,

Petitioner,

-VS-

ORESTE C. FULMINANTE,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Arizona Supreme Court err in failing to apply the totality of circumstances test in addressing the question whether Fulminante's confession to an inmate informant was made voluntarily, and did the court err in holding that admission in evidence of Fulminante's confession violated his right to due process under the Fifth and Fourteenth Amendments of the United States Constitution on the ground that the confession was coerced by the inmate informant's implied promise to protect Fulminante from other inmates who were subjecting him to rough treatment, where Fulminante never expressed any fear of the other inmates and never sought the inmate informant's protection?

2. Can the erroneous admission of an involuntary confession be subject to a harmless error analysis in a case where there is overwhelming evidence of guilt, including a second voluntary confession, and where there has been no especially egregious conduct by law enforcement officials?

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OPINIONS BELOW

The Arizona Supreme Court's 1988 opinion holding that Fulminante's confession to an inmate informant was involuntary, but that its admission was harmless error beyond a reasonable doubt, is reported at ___ Ariz. ___, ___ P.2d ___ (1988). The opinion is appended here as Exhibit A and the order granting Fulminante's motion for reconsideration is appended as Exhibit B.

The Arizona Supreme Court's 1989 supplemental opinion holding that federal constitutional law precluded it from finding Fulminante's involuntary confession to an inmate informant to be harmless error is reported at ___ Ariz. ___, ___ P.2d ___ (1989). The supplemental opinion is appended here as Exhibit C and the order denying the state's motion for reconsideration is appended as Exhibit D.

STATEMENT OF JURISDICTION

The opinions of the Arizona Supreme Court which the state asks this Court to review were entered on June 16, 1988, and July 11, 1989. The Arizona Supreme Court denied the state's motion for reconsideration on September 19, 1989. This petition is filed within 60 days from that denial, on or before November 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth
Amendment to the United States

Constitution provides:

No person . . . shall be
compelled in any criminal case to
be a witness against himself, nor
be deprived of life, liberty, or
property, without due process of
law; . . .

The pertinent part of the Fourteenth
Amendment to the United States

Constitution provides:

[N]o state shall make or enforce
any law which shall abridge the
privileges or immunities of
citizens of the United States; nor
shall any state deprive any person
of life, liberty, or property,
without due process of law; . . .

STATEMENT OF THE CASE

In the early morning hours of September 16, 1982, Richard Lence was walking his dog in the desert area outside Mesa when he discovered the mutilated, partially decomposed body of a young girl. The girl's jeans were unzipped, and had been pulled down over her buttocks. A cloth ligature or garment rag was tied around her neck.

An autopsy of the girl's body revealed that she died after being shot twice in the head at close range by a large caliber weapon, such as a .357 revolver. Although the ligature around the girl's neck did not contribute to her death, it could have been used to effect non-fatal choking prior to her death.

The body was identified as that of Jeneane Hunt, Fulminante's 11-year-old stepdaughter. Fulminante had been taking care of Jeneane from September 7-14,

while his wife Mary was in the hospital for surgery. Fulminante had telephoned the Mesa Police Department at 1:49 a.m. on September 14 to report that Jeneane was missing. When Mary returned from the hospital on September 14, she found that Fulminante's .357 Dan Wesson revolver was missing from their bedroom.

Mary told the police that Fulminante and Jeneane did not get along with each other, and that there was a lot of fighting in the Fulminante home. On one occasion, Fulminante spanked Jeneane so hard with a "spanking board" that he bruised her buttocks. The police investigated the incident and questioned Fulminante about it. Fulminante later told Mary that he would "get even" with Jeneane, and threatened to "kill her fucking ass."

During their investigation, the police found out that Fulminante traded a rifle

for an extra barrel for his .357 Dan Wesson revolver the day before Jeneane's disappearance. Fulminante's actions in purchasing the interchangeable barrel for his revolver and his numerous inconsistent statements to the police regarding Jeneane's disappearance resulted in Fulminante becoming a suspect in Jeneane's murder.

In 1983, Fulminante was serving time in Raybrook Federal Correctional Institution in New York for possession of a firearm by a felon. While at Raybrook, Fulminante became friendly with another inmate, Anthony Sarivola. Although Sarivola masqueraded in prison as an organized crime figure, he was actually an informant for the F.B.I. in matters relating to organized crime in the Brooklyn, New York City area. Sarivola heard a rumor while in prison that Fulminante had killed a child in

Arizona. Sarivola reported the rumor to his F.B.I. contact, who then told Sarivola to find out more about the rumor. Fulminante had been receiving rough treatment from the other inmates, so Sarivola told Fulminante that he had to tell him the truth in order for Sarivola to give him any help. Fulminante then admitted to Sarivola that he had taken his stepdaughter, Jeneane, out to the desert on his motorcycle, and that he then shot her two times in the head with his .357 revolver. Fulminante said he did it because Jeneane was a little bitch who was always in his way with his wife. Fulminante told Sarivola that he choked Jeneane and made her beg a little before shooting her. He also said that he forced Jeneane to perform oral sex on him.

When Fulminante was released from prison in May of 1984, Sarivola and his

fiancee, Donna, picked Fulminante up at the bus terminal. Donna asked Fulminante if he had any relatives he wanted to go see after getting out of prison.

Fulminante told Donna that he could not go back to Arizona because he had killed a little girl there. Fulminante boasted that one day he was going to make it his business to go back to Arizona so that he could "piss on her grave." Fulminante told Donna that he had taken the little girl out into the desert where he raped, beat, and choked her before shooting her in the head. Fulminante also said he made the little girl beg before he shot her. Fulminante referred to the victim as "the fucking little kid that had got in the way of him and his wife."

Fulminante's confession to Sarivola was admitted in evidence over his objection that it was involuntary, and his confession to Donna was admitted in

evidence over his objection that it was the "fruit" of Sarivola's violation of his constitutional rights approximately 6 months earlier.

Fulminante was convicted of first-degree murder. The court found as an aggravating factor that the murder was especially heinous, cruel and depraved. The court found there were no mitigating circumstances, and imposed the death penalty.

Initially, the Arizona Supreme Court affirmed Fulminante's conviction. The court agreed with Fulminante that his confession to Sarivola should have been suppressed because it was rendered involuntary by Sarivola's promise to protect Fulminante from other inmates. But, the court held that the admission of the confession was harmless beyond a reasonable doubt because it was cumulative to his second confession to

Donna, which "established his guilt." The court found that the physical evidence in the case corroborated the confession to Donna. The court specifically rejected Fulminante's claim that his confession to Donna should have been suppressed based upon the "fruit of the poisonous tree" doctrine.

Fulminante filed a timely motion for reconsideration, which the court granted. The court then issued a supplemental opinion reversing Fulminante's conviction. The court reversed its previous determination that admission of Fulminante's coerced confession to Sarivola was harmless error, and held that federal constitutional law "compels us to conclude that the receipt of the original coerced confession may not be considered harmless error."

Justice Cameron dissented from the majority opinion on the ground that "changes in the law now allow the harmless error doctrine to be applied to coerced but reliable confessions."

Following denial of a timely motion for reconsideration, the state petitioned for the instant writ of certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

The Arizona Supreme Court erred as a matter of federal constitutional law in failing to apply the totality of circumstances test in addressing Fulminante's claim that his confession was not voluntary.

Even assuming, arguendo, that the court properly found that Fulminante's confession should not have been admitted in evidence, the court erred in determining that it was precluded by this Court's prior opinions from applying a

harmless error analysis to admission of the confession. A discussion of each issue follows.

Prior to trial, Fulminante moved to suppress his confession to Sarivola on the ground that it was involuntary. Neither party presented any evidence at the suppression hearing. Instead, Fulminante adopted the following recitation of facts set forth by the state in its response to the motion to suppress:

It is a fact that Anthony Sarivola was at all times pertinent to this case a paid confidential informant for the F.B.I. He was an informant in matters that related to organized crime in the Brooklyn, New York City area. It is also true that while incarcerated in Raybrook Prison in upstate New York various rumors reached Mr. Sarivola that Oreste Fulminante had killed his step-daughter in Arizona.

Initially these were rumors and initially the truth of the rumors was denied by the defendant. It is also true that Mr. Sarivola passed the rumors on to the F.B.I. Upon being informed of those rumors, the

F.B.I. agent, Mr. Walter Ticano, supposedly said ". . . that's just a rumor, you'll have to find out more about it . . ." before I can act upon it, or words to that effect. The witness, Anthony Sarivola, went back to the defendant and asked him if these rumors were in fact true adding that he, Mr. Sarivola, might be in a position to help protect the defendant from physical recriminations in prison, but that the defendant must tell him the truth. Thereupon the defendant told Mr. Sarivola that he, in fact, had killed his step-daughter in Arizona, and gave him substantial details about how he killed the child. At no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's "protection."

(Response to Motion to Suppress, filed October 30, 1985.)

Based upon the preceding stipulated facts and argument of counsel, the trial court stated that:

The Court does not find that the statements allegedly made in this case were the result of promises, threats or coercion by the Government or any of its agents.

In its initial opinion, the Arizona Supreme Court held that the trial court

did not abuse its discretion in finding that the confession was voluntarily made, noting that " . . . defendant provided the trial court with little or no evidence tending to support defendant's claim that he was in danger and that Sarivola used this fact to coerce a confession." Despite this fact, the court then determined that the confession should have been suppressed because it found, from a review of Sarivola's trial testimony, that "In response to Sarivola's offer of protection, the defendant confessed."

Petitioner contends that the Arizona Supreme Court erroneously relied on Malloy v. Hogan, 378 U.S. 1 (1964) and Bram v. United States, 168 U.S. 532 (1897), in applying a "but-for" test to Fulminante's confession. This Court has held that the lower court must consider what effect the totality of the

circumstances had upon the will of the accused, and must determine if the accused's will was overborne when he made the statements. Schneckloth v.

Bustamonte, 412 U.S. 218, 226-27 (1973).

Factors to be considered include:

[T]he youth of the accused; his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.

412 U.S. at 226.

It is true that in Bram v. United States, 168 U.S. 532 (1897), this Court accepted the view that, to be voluntary, statements must not have been "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight." Id. at 542-43. The Bram test has not been interpreted as a per se proscription

against the admissibility of a defendant's statements merely because of promises made during interrogation. Green v. Scully, 850 F.2d 894 (2d Cir.), cert. denied, 109 S. Ct. 374 (1988); Miller v. Fenton, 796 F.2d 598, 608 (3rd Cir.), cert. denied, Miller v. Neubert, 479 U.S. 989 (1986). Despite the seemingly plain language of the Bram rule, this Court has not used a "but-for" test when promises have been made during an interrogation; rather the Court has indicated that it does not matter that the accused confessed because of the promise, so long as the promise did not overbear his will. Hutto v. Ross, 429 U.S. 28, 30 (1976) (per curiam). The ultimate question is whether the contested statements or promises were so manipulative or coercive that they deprived an accused of his ability to make an unconstrained, autonomous

decision to make the subsequent statements. See Miller v. Fenton, 796 F.2d at 608. The Arizona Supreme Court's purported reason for overruling the trial court's determination of voluntariness was because of the following testimony Sarivola gave at trial:

And we used to go walking around, and he was getting a - starting to get some tough treatment and what not from the guys and I told him, you know, "You have to tell me about it," you know. I mean, in other words, "For me to give you any help." And he told me that he did in fact kill her.

(Appendix E, R.T. of Dec. 11, 1985, p. 17-18.) The court found that Sarivola's implied promise to protect Fulminante rendered Fulminante's confession involuntary.

It is clear that the Arizona Supreme Court did not apply the correct legal test in determining that Fulminante's confession was involuntary. The court,

in essence, found that "but-for" Sarivola's promise of protection Fulminante would not have confessed. When the correct test, the totality of circumstances test, is applied to the facts of this case, it is obvious that Fulminante's will was not overborne by Sarivola's implied promise of protection.

There is nothing in Fulminante's character traits or background to suggest that he is a man whose will could be easily overborne. At the time he confessed to murdering his step daughter, Fulminante was on intimate terms with the criminal justice system. At the age of 42, he had six felony convictions and four misdemeanor convictions. Although he had dropped out of school during the fourth grade, he was of average or low average intelligence.

There is nothing in the circumstances of the interrogation to support a finding that Fulminante's will was overborne by Sarivola's implied promise of protection. The two men were both prison inmates who were on friendly terms. They had discussed the death of Fulminante's step daughter a number of times before, and the conversation in which Fulminante confessed occurred while the two men were taking an evening stroll around the prison track. Fulminante's admissions were not the end result of any lengthy interrogation by Sarivola. Although Fulminante's confession was made after Sarivola told Fulminante that he would not be in a position to protect him from other inmates unless Fulminante told him the truth, there is no indication that Sarivola's implied promise of protection induced Fulminante to confess. Even though other inmates were giving

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Fulminante a rough time in prison, he had never complained to Sarivola, he had never expressed any fear of the other inmates, and he did not ask for any help or protection from Sarivola either before or after his confession. Fulminante would have known that Sarivola was due to be released from prison in November of 1983, approximately 6 months prior to Fulminante's scheduled release in May of 1984. However, the only concern Fulminante expressed to Sarivola was his concern that the Mesa law enforcement officials would continue in their efforts to connect him with Jeneane's death after his release from Raybrook. As Sarivola stated it:

. . . He always said that they were too fucking stupid to get him, that they never knew where to look, and -- but he did say that they were constantly applying pressure and he was very, very worried it would be waiting for him when he got out of Raybrook.

(Appendix E, at 22.)

There was no especially egregious conduct by law enforcement officials in this case. There was an element of trickery and deception by the inmate informant. Sarivola gained Fulminante's confidence by being friendly with him. Sarivola did not threaten Fulminante, nor did he subject him to any mistreatment. Had Fulminante known that Sarivola was an F.B.I. informant, it is doubtful that he would have confided in him. However, the fact that Fulminante was ignorant of Sarivola's true purpose in questioning him about Jeneane's death does not render Fulminante's confession involuntary. Despite the fact Sarivola made an implied promise to protect Fulminante, it is apparent that Fulminante's will was not overborne by that promise. It is evident that Fulminante relished the opportunity to talk to another person about the details of the torture-murder of his

step-daughter. That he enjoyed talking about it is further evidenced by the admissions he later made to Donna.

This Court noted in Miller v. Fenton, 474 U.S. 104, 110 (1985), that:

Without exception, the Court's confession cases hold that the ultimate issue of "voluntariness" is a legal question requiring independent federal determination.

In the present case, the Arizona Supreme Court erroneously overruled the trial court's determination of voluntariness. The state requests this Court to grant certiorari in order to correct that error.

After initially affirming Fulminante's murder conviction on the ground that admission of his involuntary¹ confession was harmless error beyond a reasonable doubt, the Arizona Supreme

1. The state does not concede that Fulminante's confession to Sarivola was involuntary.

Court reversed his conviction in its supplemental opinion, stating that:

It is clear that federal constitutional law, as interpreted, pronounced, and applied by the United States Supreme Court and other federal courts compels us to conclude that the receipt of the original coerced confession may not be considered harmless error.

The court relied on this Court's opinions in Mincey v. Arizona, 437 U.S. 383, 319 (1978); Chapman v. California, 386 U.S. 18, 23 n.8 (1967); Jackson v. Denno, 378 U.S. 368, 376 (1964), and Payne v. Arkansas, 356 U.S. 560, 568 (1958), in support of its conclusion.

In requesting this Court to reverse the Arizona Supreme Court's opinion in this case, the state recognizes that there is substantial authority to support the position that the court took. However, none of this Court's opinions relied upon by the Arizona Supreme Court squarely addressed the question whether admission

of an involuntary confession is subject to a harmless error analysis in a case where there is overwhelming evidence of guilt.

The Arizona Supreme Court stated that this Court has made it clear that introduction of an involuntary confession is not subject to a harmless error analysis. In Milton v. Wainwright, 407 U.S. 371 (1972), however, this Court conducted a harmless error analysis in a case where a habeas petitioner claimed that his confession was both involuntary, and that it was obtained in violation of his Sixth Amendment rights.

Based upon this Court's opinion in Milton v. Wainwright, the following circuit courts and state courts have applied a harmless error analysis in cases involving allegedly involuntary confessions: United States v. Carter, 804 F.2d 487 (8th Cir. 1986); United

States v. Murphy, 763 F.2d 202 (6th Cir. 1985), cert. denied, Stauffer v. U.S., 474 U.S. 1063 (1986); Harrison v. Owen, 682 F.2d 138 (7th Cir. 1982); State v. Childs, 430 N.W.2d 353 (Wis. App. 1988); State v. Dean, 363 S.E.2d 467 (W.Va. 1987); Hinshaw v. State, 398 So. 2d 762 (Ala. 1981). See also, Meade v. Cox, 438 F.2d 323 (4th Cir. 1971); United States ex rel. Moore v. Follette, 425 F.2d 925 (2d Cir.), cert. denied, 398 U.S. 966 (1970); People v. Ferkins, 116 A.D.2d 760, 497 N.Y.S.2d 159 (1986); State v. Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986); Kelley v State, 470 N.E.2d 1322 (Ind. 1984); State v. Johnson, 35 Wash. App. 380, 666 P.2d 950 (1983); People v. Gibson, 109 Ill. App. 3d 316, 440 N.E.2d 339 (1982).

The Arizona Supreme Court refused to acknowledge that there is now a substantial body of case law that stands

for the proposition that the erroneous admission of a coerced confession does not automatically require reversal.

In Rose v. Clark, this Court stated that:

We have emphasized, however, that while there are some errors to which Chapman does not apply, they are the exception and not the rule. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis.

478 U.S. 570, 578-79 (1986) (citations omitted) (emphasis added).

Clearly, the admission at trial of Fulminante's coerced confession was not a constitutional violation insulated from a harmless error analysis under the theory that it tainted the entire trial proceeding. It was the type of evidentiary error that readily lends itself to a harmless error analysis. As this Court stated in Holloway v. Arkansas,

435 U.S. 475, 490-91 (1978):

In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury.

(Citations omitted.)

In its original opinion, the Arizona Supreme Court had no problem in determining that admission of Fulminante's coerced confession was harmless beyond a reasonable doubt under Chapman, where a second valid confession, corroborated by other evidence, provided overwhelming evidence of his guilt. It is apparent that the error in admitting a coerced confession does not, in all circumstances, taint the entire criminal proceeding. Concededly, there may be cases in which the reviewing court is unable to determine whether such error is harmless beyond a

reasonable doubt. That does not mean that it is improper to apply a harmless error analysis in a case involving a coerced confession.

CONCLUSION

This case merits this Court's attention. The Arizona Supreme Court erroneously overruled the trial court's determination that Fulminante's confession was voluntary. In doing so, the Arizona Supreme Court failed to apply the totality of the circumstances test in addressing the issue of voluntariness. When Fulminante's confession is analyzed under that test, it is apparent that Fulminante's will was not overborne by Sarivola's promise of protection.

Even assuming, arguendo, that the Arizona Supreme Court was correct in determining that Fulminante's confession was involuntary, it erred in finding that it was precluded by this Court's prior

decisions from subjecting Fulminante's involuntary confession to a harmless error analysis, where there was overwhelming evidence of his guilt, including a second valid confession.

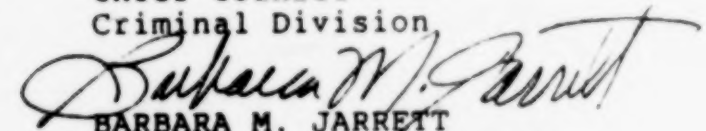
The state requests this Court to grant review in this case in order to address the question whether a conviction can ever be allowed to stand where an involuntary confession has been admitted in evidence. Obviously, there is a split in authority on that issue. This Court should grant review in this case to resolve the issue once and for all.

DATED this 17th day of November, 1989.

Respectfully submitted,

ROBERT K. CORBIN
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JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division


BARBARA M. JARRETT
Assistant Attorney General
Attorneys for PETITIONER

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

BARBARA M. JARRETT, a member of the Bar
of this Court, being duly sworn upon
oath, deposes and says:

That she served three (3) copies of the
Petition for Writ of Certiorari upon Dean
W. Trebesch and Stephen R. Collins,
Maricopa County Public Defender's Office,
Attorneys for Oreste C. Fulminante, by
depositing the same in the United States
Mail, with first class postage prepaid.

Additionally, as a courtesy, she
herewith certifies that service of three
copies of this petition has been made
upon the United States of America by
depositing the same in the United States
Mail, with first class postage prepaid,
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DATED this 17th day of November, 1989.

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Carita M. Hughes

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NOTARY PUBLIC

My Commission Expires:

January 4, 1992

CRM86-0370/1467D/ch

89-839

Supreme Court, U.S.

FILED

NOV 17 1989

JOSEPH F. SPANIOLO, JR.
CLERK

NO. 89-_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

STATE OF ARIZONA,

Petitioner,

-vs-

ORESTE C. FULMINANTE,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

APPENDICES TO
PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

[Filed June 16, 1988]

IN THE SUPREME COURT OF THE
STATE OF ARIZONA
In Banc

STATE OF ARIZONA,)	
)	
Appellee,	)	Supreme Court No.
	)	CR-86-0053-AP
v.)	
	)	Maricopa County
ORESTE C. FULMINANTE,	)	County Superior
	)	Court No. CR-142821
Appellant.)	
_____)	

Appeal from the Superior Court
of Maricopa County
The Honorable Stephen A. Gerst
AFFIRMED

Robert K. Corbin
The Attorney General
By: William J. Schafer III
Barbara A. Jarrett
Assistant Attorneys General
Attorneys for Appellee Phoenix

Ross P. Lee
Maricopa County Public Defender
By: James H. Kemper
Stephen R. Collins
Assistant Deputies Maricopa County
Public Defender
Attorneys for Appellant Phoenix

CAMERON, Justice

I. JURISDICTION

Defendant, Oreste C. Fulminante, appeals a verdict and judgment of guilt for the crime of first degree murder (A.R.S. § 13-1105(A)(1)) and a sentence of death (A.R.S. § 13-703). We have jurisdiction pursuant to Ariz. Const. Art. 6 § 5(3) and A.R.S. §§ 13-4031, 4033, and 4035.

II. ISSUES

Defendant raises the following issues on appeal:

A. Trial Issues:

1. Did the trial court err in determining that a paid informant for the Federal Bureau of Investigation did not violate defendant's fifth amendment rights?
2. Did the trial court err in holding that defendant's confession to Anthony Sarivola was voluntarily made?

3. Did admission of defendant's statement to Anthony Sarivola violate defendant's sixth amendment right to counsel?
4. Did the trial court err in admitting defendant's statements to Donna Misch (Sarivola) because the statements were the "fruit of the poisonous tree"?
5. Did the trial court err in admitting a photograph of the victim into evidence?
6. Did the trial court err in admitting evidence regarding defendant's bad character and his prior bad acts?
7. Did the trial court err in precluding defendant from presenting evidence that a third party committed the murder?
8. Did the trial court err in allowing the prosecutor to present evidence

regarding the informant's truthful character?

9. Did the trial court err in allowing the prosecutor to elicit testimony from a police officer regarding his reasons for suspecting defendant was the murderer?

B. Death Penalty Issues:

1. Are the terms "cruel, heinous, or depraved" void for vagueness?
2. Did the trial court abuse its discretion in sentencing defendant to death?
3. Does the defendant have a constitutional right to a voir dire examination of the trial judge in a death penalty case?
4. Is Arizona's death penalty statute unconstitutional because it requires imposition of the death penalty when one aggravating circumstance exists and there are no mitigating factors?

5. Is Arizona's death penalty statute unconstitutional because it allegedly lacks standards for evaluating aggravating and mitigating circumstances?
 6. Is Arizona's death penalty statute unconstitutional because it shifts the burden of proof regarding mitigating ciucumstances [sic] to the defendant?
 7. Is Arizona's death penalty statute unconstitutional because it violates defendant's sixth amendment right to a jury trial on the issue of the sentence of death?
 8. Must this court, in its independent review of the evidence, find that the death sentence is inappropriate punishment in this case?
- C. Post-Trial Issues:
1. Was defendant denied his constitutional right to the effective

assistance of counsel by his trial attorney?

III. FACTS

Defendant called the Mesa Police Department on the morning of 14 September 1982, to report the disappearance of his eleven-year-old stepdaughter, Jeneane Michelle Hunt. Shortly thereafter he drove to a hospital to pick up his wife Mary, (Jeneane's mother) who had just been released following surgery. He told Mary that the victim had not returned home the previous evening.

On 16 September 1982, the body of a young girl, later identified as Jeneane, was discovered in the desert in east Mesa. The victim had been shot twice in the head with a large caliber weapon at close range and a ligature was found around her neck. Testimony of the pathologist indicated that the ligature found around the victim's neck did not

contribute to her death, although it could have been used to effect non-fatal choking prior to death. Additionally, tests for spermatazoa and seminal fluids were negative. However, this was not unexpected given the decomposing condition of the body.

Because of a number of inconsistencies in defendant's statements concerning the victim's disappearance, particularly his claims that the victim was instructed in the use of firearms and that he had a good relationship with the victim, the defendant became a suspect in the killing. Defendant's wife stated that the relationship between the defendant and victim was poor and that the defendant had never instructed the victim in use of firearms. However, no charges were filed at that time and defendant left the state of Arizona for New Jersey.

During the investigation, police learned that on 13 September 1982 defendant had gone to a Mesa gun shop to trade a rifle for an extra barrel for his .357 revolver. Additionally, police learned defendant had a prior criminal record including a 1965 New Jersey felony conviction for impairing the morals of a child, and a 1971 New Jersey conviction for uttering a check with a forged endorsement. The police informed federal authorities of the Alcohol, Tobacco, and Firearms Bureau of facts gathered during the investigation, and on 28 October 1982, defendant was arrested in Newark, New Jersey for violating 18 U.S.C. § 1202(a), possession of a firearm by a felon. The defendant was transported to Phoenix, convicted in the U.S. District Court for the offense, and sentenced to a minimum of two years in the Federal Prison in Springfield, Missouri. On

release from Springfield, he was again arrested on another charge of possessing a firearm. He was convicted and received another two year sentence.

This time defendant was sent to the Ray Brook Federal Correctional Institution in New York. While in Ray Brook, defendant became friends with another inmate, Anthony Sarivola, who was serving a 60-day sentence for extortion. Sarivola, who was once involved with organized crime, had by this time become a paid informant for the Federal Bureau of Investigation. In Ray Brook, Sarivola masqueraded as an organized crime figure.

After Sarivola and defendant became friends, Sarivola heard a rumor that defendant was suspected of killing a child in Arizona. Sarivola asked defendant about the rumor, but defendant denied that it was true. Sarivola told his contact in the Federal Bureau of

Investigation, Agent Walter Ticano, about the rumor. Agent Ticano told Sarivola to find out more about the rumor.

At this time, according to Sarivola, defendant had been receiving "rough" treatment from the other inmates concerning the rumor, so Sarivola told defendant that if he would tell him the truth, Sarivola would give him help. On 20 October 1983 defendant admitted to Sarivola that he had taken his stepdaughter out to the desert on his motorcycle, and then shot her twice in the head with his .357 revolver.

Defendant further told Sarivola that he choked, sexually assaulted, and made the victim beg for her life before shooting her. He also stated that he hid the murder weapon in a pile of rocks at the murder scene.

Sarivola was released from Ray Brook on 28 November 1983. Defendant was released

in May of 1984. Sarivola and his fiancée, Donna, picked up defendant at a local bus terminal. Donna asked defendant if he had any relatives or friends he wished to see. Defendant indicated he could not return to his home because he had killed a little girl in Arizona. They drove defendant to a friend's house in Pennsylvania. In June 1984, defendant was arrested in New York for another weapons violation.

On 4 September 1984 defendant was indicted for first degree murder, pursuant to A.R.S. § 13-1105. Prior to trial, defendant moved to suppress evidence of the statements made to Sarivola and Donna. The trial court denied his motions.

On 19 December 1985, defendant was found guilty by a jury of first degree murder of his stepdaughter. The trial court found in its special verdict that

the murder was committed in an especially cruel, heinous and depraved manner. The trial court found there were no mitigating circumstances sufficient to overcome the aggravating circumstances and sentenced defendant to death. This appeal follows.

A. Trial Issues

1. MIRANDA WARNINGS

Defendant initially contends that he was subjected to custodial interrogation by Sarivola in violation of the fifth amendment to the United States Constitution. As a result, he claims the statements made to Sarivola were inadmissible because they were obtained in violation of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

In response to defendant's motion to suppress these statements, the trial court ruled:

The Court finds that the alleged statements contained in the State's Response (which was adopted by the Defendant for purposes of this hearing only) do not fall within the Miranda parameters. The Court does not find that at the time the statements were made that the Defendant was in custody or deprived of his freedom in a significant way. Although the Defendant was in a Federal Correctional Institution, there was no "custodial interrogation". In determining whether there was a custodial interrogation, the Court has considered 1) the site of the interrogation, 2) whether the investigation had focused on the suspect, 3) whether the objective indicia of arrest were present and 4) the length and form of the interrogation. State v. Kennedy, 116 Ariz. 556, 570 P.2d 508.

Although the site of the statements given in this case was at a Federal Correctional Institution, the Court finds that no investigation had yet focused on the Defendant, there was no objective indicia of arrest with respect to this matter, and the length of the conversation was minimal.

The Court has reviewed the case of Mathis v. United States, 391 U.S. 1 (1976) and finds nothing inconsistent with this Court's present holding. This Court does not read Mathis to hold that every

statement made to a paid informant as a result of a question asked while a person is incarcerated is a violation of Miranda. The purpose of the Miranda protections is to curtail coercive pressure to answer questions which could flow from a custodial interrogation of someone charged with or suspected of a crime. The Court does not find that the statements allegedly made in this case were the result of promises, threats of coercion by the Government or any of its agents.

We agree.

In Mathis, the defendant was serving time in a federal prison for filing false claims against the United States government. While incarcerated, Mathis was questioned by an agent of the Internal Revenue Service (IRS) concerning another matter in which Mathis had neither been arrested nor charged. Thereafter, the IRS brought criminal charges against Mathis on the basis of his statements to the IRS agent. Relying on Miranda, the United State Supreme Court held that it was reversible error

for the trial court to have permitted the introduction of Mathis's self-incriminating statements given without warnings as to his right to remain silent and seek the assistance of counsel.

Initially, defendant's argument that Mathis applies appears meritorious. Like Mathis, defendant was serving a prison term when he made his incriminating statements. Like Mathis, defendant was questioned by a government agent about a crime for which he had neither been arrested nor charged. Like Mathis, defendant was charged with and ultimately convicted of a crime based on his incriminating statements. Mathis has, however, been given a narrow interpretation and may be distinguished from the instant case.

The Ninth Circuit Court of Appeals has noted:

The question in this case is unique because Cervantes was residing in jail when the questioning occurred [sic]. Cervantes relies on Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L.Ed.2d 381 (1968), for the proposition that any interrogation during prison confinement constitutes custodial interrogation requiring Miranda warnings. We do not read Mathis so broadly.

* * * *

Adoption of Cervantes' contention would not only be inconsistent with Miranda but would torture it to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart. We cannot believe the Supreme Court intended such a result. Thus, while Mathis may have narrowed the range of possible situations in which on-the-scene questioning may take place in a prison, we find in Mathis no express intent to eliminate such questioning entirely merely by virtue of the interviewee's prisoner status.

Cervantes v. Walker, 589 F.2d 424, 427 (9th Cir. 1978).

We believe that, for Miranda purposes, defendant was not in custody when Sarivola questioned him. In considering

whether an individual is in custody, we have stated:

Because the circumstances of each case will influence a determination of whether an individual is "in custody" for purposes of administering Miranda warnings, objective indicia of custody must be considered. In State v. Kennedy, 116 Ariz. 566, 569, 570 P.2d 508, 511 (App. 1977), the court of appeals listed four factors, three of which we approve, to consider in making the determination of whether an individual is in custody. These three factors are: the site of the questioning; whether objective indicia of arrest are present; and the length and form of the interrogation. We also will consider the method used to summon the individual. See United States v. Bautista, 684 F.2d 1286, 1292 (9th Cir. 1982).

State v. Cruz-Mata, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983). In the instant case, Anthony Sarivola did not place any restraints on the defendant, and the defendant was free to leave Sarivola's presence at any time. The objective indicia of arrest were absent. The mere fact that the defendant was

incarcerated at the time the statements were made does not mandate a finding of custody. A prison inmate is not automatically in "custody" within the meaning of Miranda. United States v. Cooper, 800 F.2d 412, 414 (4th Cir. 1986). "Custody" or "restriction" in the prison context "'necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement.'" Cooper, 800 F.2d at 414 (citing United States v. Conley, 779 F.2d 970, 973 (4th Cir. 1985), cert. denied, Conley v. United States, 107 S. Ct. 114 (1986)).

We do not believe the defendant was subject to custodial interrogation by Sarivola. Miranda warnings were not required. We find no error.

2. VOLUNTARINESS OF CONFESSION

Defendant next contends that the trial court erred in determining that his

confession to Sarivola was voluntarily made. Defendant argues that the confession was the product of coercion and its use during the trial was a violation of due process under the fifth and fourteenth amendments of the United States Constitution and Art. 2, § 4 of the Arizona Constitution.

Defendant contends that because he was an alleged child murderer, he was in danger of physical harm at the hands of other inmates. Sarivola was aware that defendant faced the possibility of retribution from other inmates, and that in return for the confession with respect to the victim's murder, Sarivola would protect him. Moreover, the defendant maintains that Sarivola's promise was "extremely coercive" because the "obvious" inference from the promise was that his life would be in jeopardy if he did not confess. We agree.

The state must show by a preponderance of the evidence that a confession is freely and voluntarily made. State v. Graham, 135 Ariz. 209, 211, 660 P.2d 460, 462 (1983). A trial court's determination regarding the voluntariness of a confession however, must be viewed in a totality of the circumstances and will not be upset on appeal unless the defendant shows that the court's ruling was clear and manifest error. Id. at 211, 660 P.2d at 462.

In the instant case, at the hearing on the motion to suppress, defendant provided the trial court with little or no evidence tending to support defendant's claim that he was in danger and that Sarivola used this fact to coerce a confession. Thus, on the

evidence before it, the trial court did not abuse its discretion.¹

Since we are mandated to search the record for fundamental error, A.R.S. § 13-4035, we note that based on defendant's argument that the confession was involuntary, the trial court instructed the jury as follows:

You must not consider any statetments [sic] made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily. The defendant's statement is not voluntary whenever a law enforcement officer used any sort of violence or threats or any promise of immunity or benefit.

As a result, the trial court instructed the jury on the issue of voluntariness, but failed to instruct the jury on

1 After the ruling on the motion to suppress, Sarivola testified that the defendant had been receiving "rough treatment from the guys, and if the defendant would tell the truth, he could be protected." As discussed below this promise rendered the confession involuntary.

whether Anthony Sarivola was a law enforcement officer and it is not clear whether the jury understood Sarivola to be a "law enforcement officer". We believe the trial court erred in not instructing the jury on who would be a "law enforcement officer" when considering the voluntariness of the confession made.

At the time defendant admitted the killing to Sarivola, Sarivola was a paid government agent working with the F.B.I. Prior to the confession, Sarivola passed rumors of the defendant's alleged murder of a child along to the F.B.I. On being informed of these rumors, the F.B.I. requested that Sarivola find out more. At the same time, the defendant had been receiving rough treatment from other inmates allegedly in view of the fact that he may have been a child murderer. In response to Sarivola's offer of

protection, the defendant confessed. As we have stated:

To be deemed free and voluntary within the meaning of the fifth amendment, a confession must not have been obtained by "any direct or implied promises, however slight, nor by the exertion of any improper influence" (emphasis added). Malloy v. Hogan, 378 U.S. 1, 7, 84 S. Ct. 1489, 1493, 12 L.Ed.2d 653 (1964) (quoting Bram v. United States, 168 U.S. 532, 543, 18 S. Ct. 183, 187, 42 L.Ed. 578 (1897)). These standards also apply to the states through the fourteenth amendment. Malloy v. Hogan, 378 U.S. at 6, 84 S. Ct. at 1492.

In Arizona, confessions are prima facie involuntary and the burden is on the state to show that the confession was freely and voluntarily given. State v. Hensley, 137 Ariz. 80, 87, 669 P.2d 58, 65 (1983). The burden of proof is that of a preponderance of the evidence. Id. While the trial court's determination that a confession was voluntary will not normally be disturbed on appeal, the record must contain evidence from which the appellate court can find that the state carried its burden of proof. State v. Hall, 120 Ariz. 454, 456, 586 P.2d 1266, 1268 (1978). Bearing these requirements in mind, we have examined the entire record and find that it does not contain

sufficient evidence to support the trial court's findings of voluntariness.

State v. Thomas, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986).

In rebuttal to the defendant's motion to suppress, the state alleged that at no time did the defendant indicate he was in fear of other inmates or did he seek Sarivola's "protection." Additionally, the state says that the defendant only spoke to Sarivola in conversational tones about what he had done to his step-daughter. Such a response is insufficient to create a prima facie establishment of voluntariness by a preponderance of the evidence. Hensley, 137 Ariz. at 87, 669 P.2d at 65, later appeal, State v. Hensley, 142 Ariz. 598, 691 P.2d 689 (1984). The statements should have been suppressed.

In view of that fact, however, a similar and even more explicit confession

was also made to Donna, and this latter confession was admissible and not the "fruit of the poisonous tree." Hence, any error occurring in the instruction on the voluntariness of the Sarivola confession is harmless beyond a reasonable doubt.

The basic federal standard for harmless error states:

[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967).

The court later stated:

Our judgment [on the harmlessness of the error] must be based on our own reading of the record and on what seems to us to have been the probable impact of the [challenged evidence] on the minds of an average jury.

Harrington v. California, 395 U.S. 250, 254, 89 S. Ct. 1726, 1728 (1969).

The Harrington court concluded that the admission of certain evidence was harmless error because it was merely cumulative of other legitimately admitted evidence on the same issues and that such "overwhelming evidence" otherwise established defendant's guilt. Id. See also United States v. Hastings, 461 U.S. 499, 510-12, 103 S. Ct. 1974, 1981-82 (1983) (indicating continuing adherence to "beyond a reasonable doubt" standard).

Federal courts have approached the determination of harmless error on a case-by case basis. When a subsequent confession is obtained constitutionally, there is a definite inclination to hold that the admission of prior "inadmissible" confessions constitutes harmless error. See, e.g., United State [sic] v. Johnson, 816 F.2d 918, 923 (3rd Cir. 1987) (admission of invalid oral confession was harmless error when

subsequent written confession was admissible and more credible); Bryant v. Vose, 785 F.2d 364, 367 (1st Cir.), cert. denied, 477 U.S. 907, 106 S. Ct. 3281 (1986) (court admitted subsequent written confession that strongly indicated guilt); Martin v. Wainwright, 770 F.2d 918, 932-34 (11th Cir. 1985) cert. denied, ____ U.S. ____, 107 S. Ct. 307 (1986) (improper admission of first confession was harmless error when a lawful confession was later admitted at trial); United States v. Packer, 730 F.2d 1151, 1157 (8th Cir. 1984) (harmless error when subsequent statements reiterated earlier inadmissible statements and strongly indicated guilt).

Arizona courts follow the Chapman "beyond a reasonable doubt" standard. See, e.g., State v. Montes, 136 Ariz. 491, 497, 667 P.2d 191, 197 (1983) (subsequent statement recounted in detail

the events of the crime and rendered initial statement innocuous). In State v. Thomas, 130 Ariz. 432, 435-36, 636 P.2d 1214, 1217-18 (1981), the court expressed the harmless error rule differently:

If, however, it appears that the error did contribute to or significantly affect the verdict, fundamental error was committed and reversal is mandated on due process grounds.

Still another Arizona formulation was given in State v. Winegar, 147 Ariz. 440, 450, 711 P.2d 579, 589 (1985):

An error is harmless only if no reasonable probability exists that the verdict might have been different had the error not been committed.

See also State v. Sands, 145 Ariz. 269, 274, 700 P.2d 1369, 1374 (App. 1985) (improper admission of privileged testimony was harmless error when the evidence was "not critical" to the state's case).

Whether the standard is called "beyond a reasonable doubt," or "contribute to or significantly affect," or "no reasonable probability," or "not critical" or some other formulation, the Arizona courts seem to focus on whether there is overwhelming additional evidence sufficient to establish the prosecution's case. See, e.g., State v. Castaneda, 150 Ariz. 382, 387, 724 P.2d 1, 6 (1986) (admission of coerced confession harmless error). See also State v. Hensley, 137 Ariz. 80, 88-89, 669 P.2d 58, 66-67 (1983) (confession "merely cumulative of other, overwhelming evidence on the same point").

In the present case, the defendant's second confession established his guilt. Physical evidence from the wounds, the ligature, location of the crime scene and motorcycle tracks corroborated the confession. Therefore, the invalid first

confession was cumulative of the admissible second confession. Moreover, due to the overwhelming evidence adduced from the second confession, if there had not been a first confession, the jury would still have had the same basic evidence to convict defendant. The admission of the first confession was, therefore, harmless error beyond a reasonable doubt.

3. RIGHT TO COUNSEL

Defendant next argues that it was improper for Sarivola to question him without the presence of counsel under the sixth and fourteenth amendments to the United States Constitution and Art. 2 § 4 of the Arizona Constitution. Although defendant admits he was not under indictment for murder at the time the confession occurred [sic], he nonetheless claims that he was the focus of the investigation and incarcerated under this

pretense in order to obtain incriminating statements. We do not agree.

The sixth amendment right to counsel does not attach during pre-indictment questioning. State v. Ortiz, 131 Ariz. 195, 201, 639 P.2d 1020, 1026 (1981), cert. denied, Ortiz v. Arizona, 456 U.S. 984, 102 S. Ct. 2259 (1982). At the time of the confession, the defendant was serving a term on an unrelated charge and had not yet been indicted for murder. Moreover, based on a review of the record, there is neither evidence nor any allegations that at the time of the confession, either Sarivola or his FBI contact were aware of any official investigation in Arizona. Under these facts, no adversary proceeding had begun when defendant was questioned by Sarivola. Defendant's sixth amendment right to counsel was not violated.

4. FRUIT OF THE POISONOUS TREE

Defendant next argues that his confession to Donna should have been suppressed as the result of Sarivola's violation of defendant's fifth and sixth amendment rights approximately six months earlier, based on the "fruit of the poisonous tree" doctrine. See Wong Sun v. United States, 371 U.S. 471, 484-86, 83 S. Ct. 407, 416-17 (1963). Moreover, the defendant maintains that this original confession "let the cat out of the bag" and thus the voluntariness of his confession to Donna was not sufficient to "purge the taint" of the illegally-obtained evidence. Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 2261 (1975).

Assuming, as we have, that the confession to Sarivola was the result of a violation of defendant's fifth amendment rights, the later confession to

Donna might be inadmissible. Brown v. Illinois, 422 U.S. at 603-04, 95 S. Ct. at 2261. However, if the taint of the illegal conduct was sufficiently attenuated, that statement may be admitted as an otherwise voluntary confession, considering the time since the original statement and the presence of intervening circumstances. Rawlings v. Kentucky, 448 U.S. 98, 107-10, 100 S. Ct. 2556, 2562-64 (1980).

In the present case, some six months had elapsed between the original confession to Sarivola and the confession to Donna. Moreover, the defendant made his confession to Donna after his release from prison, presumably at a time when he no longer needed Sarivola's protection. Lastly, the defendant made the confession in the course of a casual conversation with Donna, who was not an agent of the state.

When viewed in this context, any "taint" from the earlier confession was sufficiently attenuated to permit the admission of Donna's testimony. Any argument based on "the fruit of the poisonous tree" doctrine is, therefore, inapplicable.

5. PHOTOGRAPHIC EVIDENCE

Defendant next contends that the trial court erred in admitting a "gruesome and repulsive" photograph showing a ligature around the victim's neck. Before admission into evidence, the photograph was "blacked-out" to show only portions of the neck and shoulders. The photograph did not show the face or the arms.

We have previously stated that relevant evidence may be admitted despite its tendency to inflame the passions of the jurors if its probative value outweighs the danger of unfair prejudice. Ariz. R.

Evid. 401, 403; State v. Bracy, 145 Ariz. 520, 533, 703 P.2d 464, 477 (1985), cert. denied, Bracy v. Arizona, 474 U.S. 1110, 106 S. Ct. 898 (1986); State v. Chapple, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983).

We believe the photo was relevant to a fact in issue. The defendant at trial asserted, by way of questioning, that the victim was not choked before being shot. The photograph shows the ligature positioned on the victim's neck. The photograph is relevant to the contested issue of whether the victim was choked. Accordingly, the photograph is probative of this issue and properly admitted by the trial court. State v. Hallman, 137 Ariz. 31, 34, 668 P.2d 874, 877 (1983).

Additionally, we find the blacked-out photograph was neither particularly gruesome, repulsive nor inflammatory. We find no error.

6. CHARACTER EVIDENCE

Defendant challenged a number of instances where evidence of character and prior bad acts were erroneously admitted.

a. The "spanking" incident

At trial, the victim's mother and former wife of the defendant testified that on one occasion, the defendant had spanked the victim with a spanking board, leaving bruises on her buttocks. The incident was reported to the police by school officials, who later called on the defendant to investigate the matter. Subsequently, defendant told the victim he would "get even" with her, and that he would "kill her fucking ass." Defendant argues that this evidence was improperly admitted under Arizona Rules of Evidence, 404(a)(1) because defendant's character had not been put in issue. We do not agree.

Admittedly, Rule 404(a)(1) precludes the state from introducing character evidence to show that defendant acted in conformity with such character unless the character evidence is first offered by the accused.

We need not, however, determine whether the evidence was admissible under this rule. We believe that the evidence of the defendant's troubled relationship with the victim was admissible on the issue of motive pursuant to Rule 404(b), which reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b) Arizona Rules of Evidence.

This evidence of prior trouble between the victim and the defendant derives its

relevance from the fact that the existence of prior ill will toward the victim not only renders the commission of the crime more probable, but also tends to show the malice or motive of the defendant in perpetrating the crime. Evidence of this prior bad act, taken together with defendant's expressions to get even with the victim, show a continuing state of mind from which a jury could properly infer that the defendant had a motive to kill the victim. State v. Jeffers, 135 Ariz. 404, 418, 661 P.2d 1105, 1119 (1983), cert. denied, Jeffers v. Arizona, 464 U.S. 865, 104 S. Ct. 199 (1985), reversed on other grounds, Jeffers v. Ricketts, 832 F.2d 476, 480-481 (9th Cir. 1987).² We believe

² The holding in Jeffers v. Ricketts on remand for resentencing may appear to overrule Woratzek v. Ricketts, 820 F.2d 1450 (9th Cir. 1987). Woratzek, held that the factual findings of the Arizona Court in imposing the death

believe the evidence was properly admitted.

b. Defendant's association with
Anthony Sarivola

Defendant next asserts reversible error in allowing evidence to be admitted of defendant's association with Anthony Sarivola. The defendant argues that such evidence is prejudicial because of Sarivola's connection with organized crime in New York. The state maintains

(footnote continued)
sentence is entitled to deference pursuant to 28 U.S.C. § 2254(d). As a result, a motion for rehearing is pending in the Ninth Circuit to reconcile these decisions and to question the ability of the court of appeals to independently give a narrowing construction to the aggravating factors for upholding the death sentence. In a similar situation, the United States Supreme Court recently granted review of this issue decided in Maynard v. Cartwright, 822 F.2d 1477 (10th Cir. 1987), in which the federal court of appeals interpreted the aggravating factors in Oklahoma's death sentencing scheme, cert. granted, Maynard v. Cartwright, 108 S. Ct. 693 (1988).

that such evidence was necessary to establish why Sarivola was in prison and the circumstances under which defendant came to make his confession. We agree with the State.

Initially, we note that evidence of Sarivola's organized crime connections was relevant evidence admissible under Rule 401 to show why defendant may have confessed to Sarivola to seek protection from the rest of the inmate population. Moreover, Sarivola's crime connection was relevant to show why defendant would confess to someone of Sarivola's ilk in seeking protection.

Although Sarivola's organized crime connections may be relevant, they may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, Ariz.R.Evid., State v. Hensley, 142 Ariz. 598, 602, 691 P.2d 689, 693 (1984). In

determining the relevancy and admissibility of evidence, the trial judge is invested with considerable discretion. Id. at 602, 691 P.2d at 693. Such discretion will not be disturbed on appeal unless clearly abused. Id. In the instant case, the defendant has failed to show how evidence of Sarivola's organized crime connections would cause prejudice to defendant. That Sarivola was involved with organized crime reflected on Sarivola's character, not the defendant's character. In so far as Sarivola testified as to defendant's confession, Sarivola's organized crime connection could serve to impeach Sarivola and may have, in fact, been beneficial to defendant rather than prejudicial. We believe the probative value of this evidence outweighs any prejudicial effect. Rule 403, Ariz.R.Evid. 17A A.R.S.

We find no error.

c. Prior felony convictions

Defendant next contends he was prejudiced by the admission of evidence regarding his 1971 felony conviction for issuing bad checks, and his 1983 felony conviction for being a felon in possession of a firearm. The state points out however, that the defendant did not object to the introduction of the prior convictions at trial and, therefore, waived any right to assert that the trial court erred on appeal. State v. Thomas, 130 Ariz. 432, 435, 636 P.2d 1214, 1217 (1981).

During the pre-trial proceeding, it became obvious that evidence of defendant's jail time would be admitted. This would be true of defendant's confession to Sarivola as well as the complete story of defendant's confession to Donna Misch (Sarivola.) Thus, at

least one of defendant's prior convictions would become known to the jury. Knowing this, the trial court in its voir dire of the jury asked:

There will be in this case evidence that Mr. Fulminante has been convicted of other crimes in the past. I'll give you further instructions as to the legal effects of that kind of evidence and how you should consider that evidence.

Would the fact, however, just knowing that Mr. Fulminante has had prior convictions in the past, have any effect on your ability to render a fair and impartial verdict in this matter?

* * * *

Later, the following occurred outside the presence of the jury.

The Court: The next matter was a Motion in Limine filed by the State dated November 25, relating to a request that the court enter an order allowing State to inquire of its witnesses, and that the Defendant, should he take the stand, and of his witnesses, if any, concerning the fact that the Defendant was incarcerated in Raybrook Federal Prison in New York State. Is there any argument on this motion?

Mr. Scull (prosecuting attorney): Judge, I don't think so. Most of that is moot now as I understand it because there has been an admission in the questioning to the jury about the fact that the Defendant was incarcerated, so I would assume then that I would be able to go into this at trial, to a limited extent to at least show the surroundings concerning the confessions.

The Court: It's really the opposite of a motion in limine. It's a motion to -- anticipating a possible objection, I suppose; is that right?

Mr. Scull: Well, yes. I think, because as the Court is aware, any time you mention that a Defendant has been in prison on other charges, you have got an almost instant mistrial. So to avoid that situation, I want to bring it up ahead of time.

The Court: All right. Do you wish to be heard on that, Mr. Koopman?

Mr. Koopman (defendant's attorney): Yes, Your Honor. Your Honor, I have already indicated to Mr. Scull that it would be ludicrous of us not to bring into the fact or bring in or allow in a direct case presented by Mr. Scull, the fact that my client was incarcerated in Ray Brook Prison. Otherwise, there could be

no explanation for the conversation between him and Mr. Sarivola and it would certainly hamper my attempts to attack Mr. Sarivola's credibility.

The problem that arises with this, Your Honor, is that I do not want the jury left unknowledgeable as to what the specific charge was and if the fact was he was doing time for illegal possession, as a felon, of a firearm, which was the .357 magnum, I understand, which he owned here in Arizona.

Well, if we tell the jury that he was doing time in Ray Brook for possession, as a felon in possession of a firearm, they are going to be trying to guess at what the underlying felony was.

I, therefore, have indicated to Mr. Scull that I'll stipulate and agree that he may bring into evidence the fact that my client was convicted in 1971 of the crime of uttering a check by false endorsement, which in fact he was found guilty of.

* * * *

I suggest to you, Your Honor, that this has been Mr. Scull's attempt to lay an undercurrent of sexual misconduct before the jury pertaining to my client. There's no evidence in his case at all of any sexual misconduct by my client and therefore, Your Honor, I would request that the Court order at

this point in time that neither on the direct case as put on by Mr. Scull from his witnesses, nor, if my client takes the stand, in his cross-examination of my client as to his prior convictions should that 21 year old conviction be allowed into evidence.

The Court: Well, okay. Just for purposes of clarification, his first request was to allow evidence to come in of the fact that your client was imprisoned in New York, what he was imprisoned in New York for, and the underlying felony for which that crime he was in prison for related.

Mr. Koopman: And I'm saying as long as it just goes back to the 1971 conviction for the uttering a false check, which was a felony, and not back to the 1964 conviction for carnal abuse of a child.

Defendant's attorney realized that some evidence of defendant's prior convictions would come into evidence. Indeed, the trial court had already mentioned a prior conviction in his remarks to the jury. The defendant's attorney agreed that the conviction for uttering false checks and felon in possession of a firearm could be heard and at the same time was successful

in keeping the more prejudicial conviction of carnal knowledge of a child from the jury. Since the convictions for uttering false checks and felon in possession of a firearm were introduced for the purpose of legitimate trial strategy by defendant's attorney, he seemingly struck a good bargain in allowing the conviction to come in while keeping evidence of the conviction for carnal knowledge out. We find no error.

d. Relationship with Wife

Defendant next contends that the admission of statements made by a police detective in the jury's presence concerning defendant's deteriorating relationship with his wife prior to the murder was improper. The following took place before jury:

Q. [By Mr. Scull]: Did you ever discuss with Mr. Fulminante on the 16th or 17th his relationship with his stepdaughter, Jeneane?

A. [By Mark Jones]: Yes.

Q. What was his response?

A. He felt that his relationship with his daughter was good. In fact, he made the comment that because Mary worked, and he didn't, that Jeneane would come to him with her problems.

Q. All right. Did he indicate or did you ever ask him how his relationship was with Mary?

Mr. Koopman: Objection, irrelevant.

The Court: Sustained.

Well, wait a minute, let me --

Mr. Scull: There's going to be a tie in, Judge.

The Court: I'll let you -- on what basis are you asking that that be -- why are you objecting to that?

Mr. Koopman: Your Honor, I don't see what my client saying his relationship with his wife is has to do with the death of this little girl. I also -- I also think that it might go -- we might be [infringing] on the spousal relationship, Your Honor, and the privilege attached thereto, which may come into issue at sometime in this case.

The Court: Let me hear you.

Mr. Scull: I'm asking what Mr. Fulminante said about his relationship with Mary. One of the things that the State expects to prove is that the relationship between Oreste Fulminante and Mary was not good. It was deteriorating rapidly and that's one of the reasons that we believe he committed this homicide, was to get rid of this girl so that he could re-establish his relationship with his wife.

The Court: Let me see counsel at the bench for a moment, please.

(Whereupon, a discussion was held at the bench between the Court and both counsel, out of the hearing of the jury and the Court Reporter.)

The Court: The objection is sustained.

Defendant first argues that the prosecutor's argument was clearly improper, and that it should have been stricken. Defendant is, however, precluded from arguing for the first time on appeal that the prosecutor's comments should have been stricken where he failed to request the trial court to do so.

State v. Thomas, 130 Ariz. 432, 435, 636 P.2d 1214, 1217 (1981).

Defendant further argues that it was prejudicial for the jury to hear the argument on the objection to the question. Again, defendant did not request to have the matter heard outside the jurors' presence. In any event, defendant suffered no prejudice because of the prosecutor's comments. The state subsequently presented direct and more damaging testimony from defendant's wife that defendant's relationship with her was troubled. We find no error.

e. Evidence that other persons suspected defendant had committed the crime

Defendant next contends the trial court erred in admitting testimony from a police detective that others felt defendant had committed the crime. This matter is raised as a separate grounds

for error in item 9 of the Trial Issues.
We will consider the question under that heading.

f. Evidence of victim's dislike of defendant

The victim's mother testified as follows:

Q. [By Mr. Scull] Was there a time when she spent the night over at a friend's house and that was without prior approval from you?

A. [By Mary Elizabeth Hunt] Yes.

Q. Okay. On that occasion, were you advised of that, that she was doing that?

A. I had found out where she was. I did not know that she was planning to do that without my knowledge, no, but I did find out where she was.

Q. All right. What did you do about it?

A. Well, I made an arrangement with the mother of the little girl whose house where she went to stay would take care of her for that weekend until I had a chance to collect my thoughts and decide what we should do about it.

Q. All right. What did you do about it?

A. Well, we decided that, you know, she came home over the weekend, and I decided to talk to her, and to ask her, you know; she told me why she did what she done and it was because she didn't want to stay in the house with Oreste any more and she really didn't want to come back home if he was going to stay.

Q. Is that the only occasion like that?

A. Jeneane has never, ever, ever left that house. That was the first time.

Defendant argues that evidence of the victim's dislike and desire not to continue living in the same household with defendant was improperly admitted. The defendant further maintains the evidence was victim's opinion as to the defendant's character, and thus is prejudicial and irrelevant. We disagree.

We believe that under the circumstances in which the statements were made, the statements lie within an exception to the

hearsay_rule. Pursuant to Rule 803(3), Ariz.R.Evid., the then existing state of mind of the victim may be admissible to show the victim's dislike of the defendant.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Ariz.R.Evid. 803(3) 17A A.R.S.

The victim's desire in this case was not being offered to prove anything remembered or believed. It fits within the state of mind exception, and it was relevant. Rule 401 provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

As we have stated:

Evidence is relevant if it has any basis in reason to prove a material fact in issue or if it tends to cast light on the crime charged.

State v. Moss, 119 Ariz. 4, 5, 579 P.2d 42, 43 (1978).

The wish of the victim not to live in the same house with the defendant was relevant in this case because it was used to show that the victim and defendant did not get along and ill feelings existed between the parties. Establishing that the victim disliked the defendant and hence that the family situation was not harmonious, were factors in disputing defendant's claims that he had no reason or motive to murder the victim. Additionally, since the defendant claimed that the victim and he got along well, and no feelings of ill will between the parties existed, the statements of the victim's mother are relevant to dispute

this contention. See People v. Arcega, 32 Cal. 3d 504, 527, 186 Cal. Rptr 94, 107, 651 P.2d 338, 350 (1982).

This kind of statement is unlike the one recently held inadmissible and irrelevant by this court. State v. Charo, slip op. at 6 (filed April 21, 1988). In that case, this court held that the victim's fear is irrelevant to prove the defendant's conduct. Id. at 8. Conversely, in this case, the evidence of the victim's dislike, as opposed to fear, of the defendant is not being used to show the defendant's conduct; rather it is being used as evidence of the defendant's motive for killing the victim.

We believe the evidence was admissible and relevant for the purpose of establishing the troubled relationship between the defendant and the victim and that the probative value of the disputed

evidence was not outweighed by the danger of unfair prejudice. Jeffers, 135 Ariz. at 417, 661 P.2d at 1128. We find no error.

g. Defendant's reputation for truthfulness

During direct examination, Sarivola testified as follows:

Q. [By Mr. Scull]: Now, what kind of reputation, if you know, did Mr. Fulminante have around the prison for being truthful and honest?

A. [By Mr. Sarivola]: Well, most people believe him not to be truthful.

Defendant argues this evidence was not presented for the purpose of impeachment, because the defendant did not testify, but rather presented to show the defendant was of bad character, in violation of Rule 404(a), Arizona Rules of Evidence. Defendant also contends the admission of the evidence violated Rule 608(a), Arizona Rules of Evidence.

We need not consider this allegation. Defendant made no objection and may not raise the question on appeal. We have previously held:

It is well established that failure to object to evidence, testimony or arguments waives these matters on appeal. See, e.g. State v. Wilson, 113 Ariz. 308, 533 P.2d 235 (1976). Additionally, a party must state distinctly the matter to which he objects and the grounds of his objections. State v. Baca, 102 Ariz. 83, 425 P.2d 108 (1967): 17A A.R.S. Rules of Evidence, Rule 103(a)(1). By failing to make a timely, specific objection to the prosecutor's remarks or the victim's testimony, appellant has waived these issues on appeal absent a finding of fundamental error.

State v. Thomas, 130 Ariz. 432, 435, 636 P.2d 1214, 1217 (1981). See also, State v. Smith, 136 Ariz. 273, 277, 665 P.2d 995, 999 (1983), appeal after remand, 141 Ariz. 510, 687 P.2d 1265 (1984).

The error if such, was waived.

7. EVIDENCE THAT A THIRD PARTY
COMMITTED THE MURDER

Defendant claims the trial court erred in precluding relevant evidence bearing on reasonable doubt as to the defendant's guilt. Defendant's offer of proof showed that a neighbor of the victim and the defendant drove a motorcycle, owned a .357 magnum handgun, had attempted to kill a police officer on one occasion, and was suspected of committing crimes against children. Defendant failed, however, to offer any evidence that connected the neighbor to the crime in this case. The court denied the defendant's request to introduce this evidence.

Before a defendant may introduce evidence that another person may have committed the crime, the defendant must show that the evidence has an inherent tendency to connect such other person

with the actual commission of the crime. Vague grounds of suspicion are not sufficient. State v. Williams, 133 Ariz. 220, 231, 650 P.2d 1202, 1213 (1982).

The evidence offered by the defendant, although establishing that the third party may have had the ability to commit the crime, failed to connect him to the murder. The trial court's discretion in this matter will not be disturbed unless it has been clearly abused. Id. at 230, 650 P.2d at 1212. We find no abuse of discretion by the trial court.

8. EVIDENCE OF ANTHONY SARIVOLA'S
CHARACTER

Prior to trial, the trial court ruled that the defendant would be allowed to impeach Anthony Sarivola with a specific instance in which he had lied to an FBI agent. As a matter of trial strategy, the prosecutor disclosed the incident during his direct examination of the FBI

agent. The prosecutor then asked the agent his opinion as to Sarivola's credibility. Defendant unsuccessfully objected.

On review, defendant asserts the admission of the testimony violated the Arizona Rules of Evidence which state:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Ariz. R. Evid. 608(a).

We do not agree. Under Rule 608(a), a witness may testify as to his opinion of another party's truthfulness if the party's truthful character has been attacked. United States v. Hilton, 772 F.2d 783, 786 (11th Cir. 1985). In the instant case, the trial court had ruled

that Sarivola's truthful character could be attacked by defendant. It was not error for the state to "draw the sting" by not only introducing on direct examination the evidence of instances in which Sarivola had lied to the FBI agent, but of the agent's opinion of Sarivola's character. We find no error.

9. ADMISSION OF OPINION OF GUILT

During the cross-examination of the investigating detective, defense counsel inquired as to why he thought the defendant had committed the murder and the basis of his opinion. The defense counsel first read from a treatise on the Fundamentals of Criminal Investigation.

Q. [By Mr. Koopman]: "The best hypotheses must be objectively tested and modified or rejected when contrary evidence is uncovered. The investigator must not permit his observations and interpretations to be biased in favor of the hypotheses."

Would you like to read?

A. [By Mark Jones]: No, sir.

Q. Okay. Do your [sic] understand what Mr. O'Hara is saying in that statement?

A. Yes, sir, I do.

Q. Do your [sic] agree with that statement?

A. Yes, I do.

Q. And in fact, would it be fair to say that that type of criminal investigation technique warning warns you not to allow a bias toward a suspect interfere with your investigation?

Haven't you learned that, also, in other courses, in other investigative courses throughout your career?

A. Yes, sir.

Q. But on September the 16th, just shortly after the body of little Jeneane Hunt was found, you put it in your mind that this man was the killer of that little girl; correct?

A. Yes, sir, I knew he was.

Q. You knew he was?

A. Yes, sir.

Q. You knew he was from what physical evidence that you had at that point in time, Officer?

A. From the inconsistent statements at that time.

Q. From the inconsistent statements wherein he said if I can recall, "I drove toward Apache Junction," when in fact he told Officer Riggs he drove toward Phoenix, correct?

A. That's only one.

Q. That's one. Another one is, he told Riggs he would talk to neighbors in the morning, but you found out he didn't talk to neighbors until the afternoon; correct?

A. He did not talk to neighbors. He talked to a neighbor.

Q. Talked to a neighbor. And for those two inconsistencies, you considered this man a murderer of his stepchild, and therefore, set out to prove him guilty; is that correct?

A. No, sir. There's much more to it than that.

Q. Well, you didn't have much more on September the 16th. At that point in time, the autopsy hadn't been done?

A. I knew that he had purchased an extra barrel for his weapon.

Q. Okay.

A. I knew that he was telling us that he had sold a gun to buy milk and bread, and in fact, on the 17th, we found out that he used that gun to trade for an extra barrel for that weapon.

Q. And \$20, correct?

A. Yes, sir, he did receive \$20.

On redirect examination, the detective was asked if he had any other evidence on which he based his opinion. Defense counsel objected, but the objection was overruled. The trial court ruled that counsel had "opened the door" regarding the reasons the detective suspected the defendant, and the information relied on in forming that opinion. Defendant now contends that it was improper and prejudicial for the detective to testify as to his opinion or suspicion of guilt of the defendant, or in the alternative the testimony was hearsay. We do not agree.

On rebuttal the state may offer any competent evidence that directly replies to or contradicts any material evidence introduced by the accused. Moreover, as we have noted:

Generally, where the defendant, by putting on testimony opens the door to proper rebuttal, he cannot complain if rebuttal testimony, offered by the State, also tends to prove or reinforce the State's case in chief * * *.

State v. Kountz, 108 Ariz. 459, 463, 501 P.2d 931, 935 (1972), (quoting State v. Dowthard, 3 Ariz. App. 237, 239, 413 P.2d 296, 298 (1966)). We find no error.

B. Death Penalty Issues

1. ARE THE TERMS "CRUEL, HEINOUS, OR DEPRAVED" VOID FOR VAGUENESS?

Defendant contends that the terms "especially heinous, cruel or depraved,"

are unconstitutionally vague. This court has previously stated that the terms "cruel, heinous, or depraved," are not void for vagueness.

We have objectively defined the relevant terms: a murder is "heinous" if "hatefully or shockingly evil;" "cruel" if "disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic;" and "depraved" if "marked by debasement, corruption, perversion or deterioration." State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied, 435 U.S. 908, 98 S. Ct. 1458, 55 L.Ed.2d 500 (1978). Cruelty focuses on the sensations of the victim before death, depravity focuses on the murderer's state of mind, and heinousness focuses on society's view of the murder as compared to other murders. To use this aggravating circumstance, the trial court must find that the murder is especially heinous, cruel, or depraved. State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979). We believe these standards satisfy Godfrey and that the especially cruel, heinous, and depraved aggravating circumstance has not been defined in an unconstitutionally broad and vague manner.

State v. Ortiz, 131 Ariz. 195, 206, 639

P.2d 1020, 1031 (1981), cert. denied,
Ortiz v. State, 456 U.S. 984, 102 S. Ct.
2259 (1982). We find no error.

2. WAS THE DEATH PENALTY PROPERLY
IMPOSED?

We have the duty to independently
review the existence of aggravating or
mitigating circumstances and to determine
whether the death penalty was improperly
imposed or should be reduced to life
imprisonment. State v. Roscoe, 145 Ariz.
212, 226, 700 P.2d 1312, 1326 (1984),
cert. denied, Roscoe v. Arizona, 471 U.S.
1094, 105 S. Ct. 2169 (1985); State v.
Richmond, 114 Ariz. 186, 196, 560 P.2d
41, 51 (1976), cert. denied, Richmond v.
State, 433 U.S. 915, 975 S. Ct. 2988
(1977).

Defendant was found guilty of one count
of first degree murder. The trial court
by special verdict, A.R.S. § 13-703(D),
found as an aggravating circumstance that

the murder was committed in an especially cruel, heinous, or depraved manner. Finding no mitigating circumstances sufficiently substantial to outweigh this aggravating circumstance, the trial judge sentenced the defendant to death.

Defendant contends that the trial court improperly imposed the death penalty by finding as an aggravating factor the murder was especially cruel, heinous, or depraved. A.R.S. § 13-703(F)(6) establishes as an aggravating circumstance the fact that a defendant commits a murder in an especially cruel, heinous, or depraved manner. These terms are considered disjunctive; the presence of any one of the three factors is an aggravating circumstance. State v. Correll, 148 Ariz. 468, 480, 715 P.2d 721, 733 (1986).

a. Cruelty

Cruelty is manifested by a murder "disposed to inflict pain especially in a wanton, insensate, or vindictive manner: sadistic." State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied, Knapp v. Arizona, 435 U.S. 908, 98 S. Ct. 1458 (1978). Cruelty involves the pain and suffering of the victim, including any mental distress suffered prior to death. State v. Castaneda, 150 Ariz. 382, 393, 724 P.2d 1, 12 (1986); State v. Bracy, 145 Ariz. 520, 537, 703 P.2d 464, 481 (1985), cert. denied, Bracy v. Arizona, 474 U.S. 1110, 106 S. Ct. 898 (1986). Thus, to suffer pain or distress, the victim must be conscious at the time the offense is committed. If the evidence is inconclusive on consciousness, the factor of cruelty cannot exist. State v. Gillies, 135 Ariz. 500, 513, 662 P.2d 1007, 1020

(1983), cert. denied, Gillies v. Arizona,

470 U.S. 1059, 105 S. Ct. 1775 (1985).

As to cruelty the trial court noted:

The court finds from the evidence, and the reasonable inferences to be drawn from the evidence, that the crime was especially cruel and that Jeneane Hunt suffered pain and mental and physical distress at the time of the crime.

The Defendant told Anthony Sarivola, a witness who testified at the trial, that prior to killing his stepdaughter he "choked her and made her beg a little bit."

The Defendant told Donna Sarivola, also a witness who testified at the trial, that he "choked her until every last breath - and then shot her." He also told Donna Sarivola that he "made her beg," "beat her", and "tortured her."

The court finds the witnesses were credible and that the Defendant did, in fact, make such statements.

The court finds independent corroboration with respect to part of the statements by the Defendant.

The trial evidence, including photographs, show that the

ligature had been tied loosely around Jeneane Hunt's neck and was on the body when it was found. The child's mother testified the ligature appeared similar to cloth from a worn out towel.

Additional evidence of cruelty exists in the trial record. The defendant made a statement to the child's mother of his "theory" that the child "was kneeling on the ground on her knees and she must have known it was coming. She was then shot on one side of the head and then the other."

There were additional statements made by the Defendant to the Sarivolas wherein he stated that he made the child commit an act of oral sex on him and that he raped her.

The court finds such statements were, in fact, made by the Defendant, however, there is no independent corroboration of the statements relating to sexual misconduct from any of the findings of the medical examiner or the physical evidence produced at trial.

The court finds that the possibility of sexual misconduct exists but the evidence is inconclusive and not beyond a reasonable doubt.

The statements attributed to the Defendant regarding acts of sexual misconduct are not, therefore,

being considered on the issue of cruelty. Such statements are, however, being considered on the issue of whether the crime was committed with a heinous and depraved state of mind. (Emphasis in original)

Based on a review of the record, we find the presence of cruelty is supported by the evidence presented at trial. The fear that apparently was felt by the victim, the fact that she could anticipate that she would be murdered after being abused by her stepfather shows that this killing was wanton and sadistic, and supports a finding of cruelty.

b. Heinous and Depraved

A murder is especially heinous if it is "hatefully or shockingly evil." Knapp, 114 Ariz. at 543, 562 P.2d at 716. A murder is depraved if "marked by debasement, corruption, perversion or deterioration." Knapp, 114 Ariz. at 543, 562 P.2d at 716. The terms "heinous" and

"depraved" focus upon a defendant's state of mind at the time of the offense, as reflected by his words and acts. State v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983).

This court has set forth five factors to consider in the determination of the existence of heinous or depraved conduct:

1. relishing of the murder by the defendant;
2. the infliction of gratuitous violence on the victim beyond that necessary to kill;
3. mutilation of the victim's body;
4. the senselessness of the crime; and
5. helplessness of the victim.

State v. Gretzler, 135 Ariz. 42, 52-53, 659 P.2d 1, 11-12, cert. denied, Gretzler v. Arizona, 461 U.S. 971, 103 S. Ct. 2444 (1983).

This court has also stated that in the rape and murder of a young girl:

Abduction, violent sexual penetration and strangulation of a helpless seven year old child are circumstances that lead to only one conclusion. The senseless killing and the entire nature of the attack are repugnant to civilized society. The elements of a heinous crime and a depraved state of mind are present.

State v. Roscoe, 145 Ariz. 212, 226, 700 P.2d 1312, 1326, cert. denied, Roscoe v. Arizona, 471 U.S. 1094, 105 S. Ct. 2169 (1985).

Similarly, in the killing of an elderly woman we stated:

The victim in this case was 78 years old. She had limited mental capabilities and was easily manipulated. She was helpless at the hands of appellant. He could have accomplished whatever criminal goals he desired without killing her We find that by sexually assaulting Winifred Duggan and senselessly killing her, knowing full well that by virtue of her advanced age and limited mental capabilities she was easy prey, appellant demonstrated a shockingly evil and corrupt state of mind.

State v. Zaragoza, 135 Ariz. 63, 69-70, 659 P.2d 22, 28-29, cert. denied,

Zaragoza v. Arizona, 462 U.S. 1124, 103

- S. Ct. 3097 (1983).

We believe the record supports the findings of heinous or depraved conduct in the case before us. Defendant senselessly killed a helpless victim, and as reprehensible as this may be, also violated the special parental relationship.

As the trial court noted:

The court finds from the evidence and the reasonable inferences to be drawn from the evidence that the Defendant acted with an especially heinous and depraved state of mind.

The statements made to Anthony Sarivola and to Donna Sarivola reveal the Defendants state of mind.

The Defendant told Anthony Sarivola that he "hated" Jeneane and he referred to her as a "little fucking bitch."

The Defendant told Donna Sarivola that, "I want to go piss on her grave."

The other statements made by the Defendant to the Sarivolas

relating to oral sex, rape, torture, beating, making her beg, choking her until every last breath - whether they all occurred or not - show a state of mind that is shockingly evil and marked by debasement. These were statements of a man who was bragging and relishing the crime he committed.

* * * *

In considering the senselessness of the crime and the helplessness of the victim the Court has considered the special relationship of sacred parental trust which was violated. The victim was the stepdaughter of the Defendant. She was only eleven years old. Found after three days in the desert she weighed less than ninety pounds. She was a child under parental control and capable of manipulation by the Defendant. He took her to an isolated desert area where she could not be heard, would have less chance of escape, and would be subject to his complete control. She posed no threat to the Defendant at any time. She was helpless. She was easy prey. He could have accomplished any of his goals without killing her.

We find that the statutory aggravating circumstances are present to uphold the propriety of the death sentence.

3. VOIR DIRE EXAMINATION OF THE
TRIAL JUDGE

In the instant case, defendant argues that the Arizona death penalty statute, A.R.S. § 13-703, violates the constitutional right to due process because it fails to provide for the voir dire of the trial judge for possible bias or prejudice so that a defendant can intelligently exercise his peremptory challenge for cause.

Several general propositions of law run contrary to the defendant's claim. At the outset, a judge is presumed to be fair. State v. Perkins, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984). Secondly, as this court has stated in a case where an accused claimed it was his fundamental right to approve the judge:

While defendant in a criminal case may be entitled, as a constitutional right, to an impartial (and independent) judge, he is not entitled, as a matter of

right, to any particular judge, or a constitutional right to a change of judge. (citations omitted).

State v. Reid, 114 Ariz. 16, 21, 559 P.2d 136, 141 (1976), cert. denied, Reid v. Arizona, 431 U.S. 921, 97 S. Ct. 2191 (1977).

This court's definition of bias and prejudice further enunciates the standard applied to judicial disqualification:

Bias and prejudice means a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants. The fact that a judge may have an opinion as to the merits of the cause or a strong feeling about the type of litigation involved, does not make the judge biased or prejudiced.

State v. Meyers, 117 Ariz. 79, 86, 570 P.2d 1252, 1259 (1977), cert. denied, Meyers v. Arizona, 435 U.S. 928, 98 S. Ct. 1498 (1978).

Defendant's claim is not the same as the right to voir dire a jury. A judge is not the unknown quantity a prospective

juror may be. Furthermore, the right to a fair and impartial tribunal is adequately protected by Arizona Rules of Criminal Procedure 10.1 and 10.2, which allow for a change of judge.

Finally, the fact that there is mandatory appeal in death sentence cases insures that this court will independently review the findings to determine if they are supported by the record, and not based on bias and prejudice. State v. Jeffers, 135 Ariz. at 428, 661 P.2d at 1129. Defendant has no constitutional right to conduct a voir dire examination of the trial judge.

4. IS ARIZONA'S DEATH PENALTY UNCONSTITUTIONAL BECAUSE IT REQUIRES IMPOSITION OF THE DEATH PENALTY WHEN ONE AGGRAVATING CIRCUMSTANCE EXISTS AND THERE ARE NO MITIGATING FACTORS?

In Arizona, under A.R.S. § 13-703(E), the trial court must impose a sentence of death if it finds the existence of one

statutory aggravating factor and does not find the existence of any mitigating factor sufficient to call for leniency.

Under § 13-703(E) if a case involves one or more of seven enumerated aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency then the trial court is required to impose a sentence of death.

State v. Zaragoza, 135 Ariz. 63, 69, 659 P.2d 22, 28, cert. denied, Zaragoza v. Arizona, 462 U.S. 1124, 103 S. Ct. 3097 (1983).

Defendant contends that the statute is unconstitutional because if the court finds aggravating circumstance and no mitigating circumstance, then the court must impose the death penalty. We do not agree. As we have noted in State v. Beaty, No. CR 85-0211 PR, slip op. at 31-32 (filed May 5, 1988), the statute reduces the human element in the imposition of the death penalty and in

doing so saves the constitutionality of the statute. Under the statute a defendant will stand the same chance of receiving the death penalty from a judge who does not philosophically believe in the death penalty as from a judge who does. Id. at 32. By applying the death penalty only to those who come under the statute, the death penalty is reserved only for crimes and those criminals the legislature intended to be covered by the statute. We find no error.

5. IS ARIZONA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL BECAUSE INADEQUATE STANDARDS ARE UTILIZED BY TRIAL COURTS IN BALANCING AGGRAVATING CIRCUMSTANCES AGAINST MITIGATING CIRCUMSTANCES?

Defendant contends that in Arizona, the death penalty is imposed wantonly, arbitrarily and freakishly because no ascertainable standards are provided for the sentencing authority to measure the relative weights to be given the

aggravating and mitigating factors which have been found to exist. This contention has been rejected numerous times by this court. See generally, State v. Gretzler, 135 Ariz. 42, 53-54, 659 P.2d 1, 12-13, cert. denied, Gretzler v. Arizona, 461 U.S. 971, 103 S. Ct. 2444 (1983); State v. Greenawalt, 128 Ariz. 150, 175, 624 P.2d 828, 853, cert. denied, Greenawalt v. Arizona, 454 U.S. 882, 102 S. Ct. 364 (1981); State v. Mata, 125 Ariz. 233, 241-42, 609 P.2d 48, 56-57, cert. denied, Mata v. Arizona, 449 U.S. 938, 101 S. Ct. 338 (1980). We find no error.

6. IS ARIZONA'S DEATH PENALTY
STATUTE UNCONSTITUTIONAL BECAUSE
IT SHIFTS THE BURDEN OF PROOF
REGARDING MITIGATING
CIRCUMSTANCES TO THE DEFENDANT?

Defendant contends that in Arizona, the death penalty is unconstitutional because it impermissibly shifts the burden of proof regarding mitigating circumstances

to defendant. This issue has also been rejected numerous times by this court. State v. Correll, 148 Ariz. 468, 483, 715 P.2d 721, 736 (1986); State v. Smith, 125 Ariz. 412, 416, 610 P.2d 46-50 (1980). We find no error.

7. IS ARIZONA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL BECAUSE IT VIOLATES DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL ON THE ISSUE OF THE SENTENCE OF DEATH?

Defendant asserts that the sixth amendment of the United States Constitution requires that a jury trial be held on the question of the existence or non-existence of both aggravating and mitigating factors.

It is further asserted that a jury trial is constitutionally required on the issue of the death sentence.

We have previously disposed of this question. State v. Correll, 148 Ariz. at

433-84, 715 P.2d at 736-37. We find no error.

8. PROPORTIONALITY REVIEW

We must also examine the cases to determine if the sentence imposed is proportional to other death penalties imposed in Arizona and other jurisdictions. In doing so, we must keep in mind that the death penalty is applied only to certain cases of first degree murder.

The legislature has made it clear that the death penalty is not to be imposed in every case of first degree murder. The death penalty is reserved for those cases where the manner in which the crime was committed raises it above the norm of first degree murders, or the background of the defendant places the defendant above the norm of first degree murderers.

State v. Blazak, 131 Ariz. 599, 604, 643 P.2d 694, 700, cert. denied, Blazak v. Arizona, 459 U.S. 882, 103 S. Ct. 184 (1982).

We also conduct a proportionality review in order to determine whether the imposition of the death penalty in this case violates the eighth amendment. The question is "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant." State v. LaGrand, 153 Ariz. 21, 37, 734 P.2d 563, 579, cert. denied, LaGrand v. Arizona, ___ U.S. ___ 108 S. Ct. 207 (1987); State v. Bracy, 145 Ariz. 520, 538, 703 P.2d 464, 482 (1985), cert. denied, Bracy v. Arizona, 474 U.S. 1110, 106 S. Ct. 898 (1986).

A similar case is State v. Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986), where defendant abducted and sexually assaulted two twelve-year-old boys, later killing one of the victims. This court found that the murder was committed in an especially cruel, heinous, and depraved

manner, and that the death penalty was properly imposed. Castaneda, at 395, 724 P.2d at 14. Likewise, in State v. Roscoe, 145 Ariz. 212, 700 P.2d at 1312 (1984), cert. denied, Roscoe v. Arizona, 471 U.S. 1094, 105 S. Ct. 2169 (1985), defendant abducted, sexually assaulted, and strangled a helpless seven-year-old girl. This court found that the murder was committed in an especially cruel, heinous, and depraved manner and that the death penalty was properly imposed. Roscoe, at 226-227, 700 P.2d at 1326-1327. See also, State v. Ortiz, 131 Ariz. 195, 208, 639 P.2d 1020, 1027, cert. denied, Ortiz v. Arizona, 456 U.S. 984, 102 S. Ct. 2259 (1982) (death penalty upheld where defendant inflicted multiple stab wounds in the neck and chest areas of the victim before pouring gasoline on her and igniting it). Most recently, the death penalty was affirmed

in State v. Beaty, No. CK 85-0211 PR, slip op. at 19-22 (filed May 5, 1988), involving the sexual assault and murder of a thirteen-year-old girl. We have also considered the following similar cases in which we found the death penalty properly imposed: State v. Clabourne, 142 Ariz. 335, 347-48, 690 P.2d 54, 66-67 (1984); State v. Gillies, 142 Ariz. 564, 570, 691 P.2d 655, 661 (1984), cert. denied, Gillies v. Arizona, 470 U.S. 1059, 105 S. Ct. 1775 (1985); State v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983). In each of these cases the defendant both sexually assaulted and murdered the victim, and properly received the death penalty based upon a finding of one or more of the aggravating circumstances.

Additionally, we have considered cases where the death penalty was reduced to life imprisonment by this court. See

State v. Johnson, 147 Ariz. 395, 710 P.2d 1050 (1985) (defendant did not create grave risk of danger to others or commit murder in a cruel, heinous or depraved manner and no other aggravating circumstances were present); State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983) (insufficient evidence that defendant intended to kill victim who was beaten and locked in trunk of car); State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983) (substantial mental impairment due to drug addiction, neurological problems, and brain damage; vulnerability to influence; lack of prior record of violence); State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982) (youth of defendant); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981) (change of character and goals while in prison; youth of defendant; murder occurred [sic] as a result of shootout begun by victim);

State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) (substantial mental impairment due to brain lesion). The facts in the instant case are not similar to these cases where we reduced the penalty from death to life imprisonment.

Based on our review of other decisions of this court, we believe that the circumstances of this murder indicate that it is above the norm of the first degree murders. See State v. Blazak, 131 Ariz. 598, 604, 643 P.2d 694, 700, cert. denied, Blazak v. Arizona, 459 U.S. 882, 103 S. Ct. 184 (1982). We find that imposition of the death penalty is proportional to the penalties imposed in similar cases in this state.

In addition to making an independent determination of the propriety of the death sentence in Arizona, the court also conducts a proportionality review to determine whether the sentence of death

is excessive or disproportionate [sic] to the penalties imposed in similar cases in other jurisdictions. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), cert. denied, Richmond v. Arizona, 433 U.S. 915, 975 [sic] S. Ct. 2988 (1977).

We believe that the defendant's sentence is similar to the sentences received by other defendants for similar crimes committed against minors. See generally, State v. Morales, 32 Ohio St.3d 252, 513 N.E.2d 267, 276-277 (1987) cert. denied, Morales v. Ohio, ___ U.S. ___, 103 S. Ct. 785 (1988); State v. Simants, 197 Neb. 549, 566, 250 N.W.2d 881, 891, cert. denied, Simants v. Nebraska, 434 U.S. 878, 98 S. Ct. 231 (1977), State v. Loyd, 489 So.2d 898, 906 (La. 1986), stay granted, 491 So.2d 1348 (1984), cert. denied, Loyd v. Louisiana, ___ U.S. ___, 107 S. Ct. 1984 (1987);

Davis v. State, 477 N.E.2d 889, 900-901 (Ind.), cert. denied, Davis v. Indiana, 474 U.S. 1014, 106 S. Ct. 546 (1985); Adams v. State, 412 So.2d 850, 855-857 (Fla.), cert. denied, Adams v. Florida, 459 U.S. 882, 103 S. Ct. 182 (1982). In each of these cases the victims were children who were either sexually assaulted or cruelly beaten during the perpetration of the crime, and in each case the death penalty was imposed. We find that the disposition in the instant case is not disproportionate to sentences in other jurisdictions in capital cases involving the death of children.

C. Post-Trial Issues

1. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that he received ineffective assistance of counsel in the failure of counsel to object to various evidentiary rulings with resulting

waiver. Specifically, defendant contends his counsel failed to move to strike the character evidence including testimony of the defendant's relationship with his wife, evidence that other persons thought the defendant had committed the crime, and the failure to object to evidence submitted as to defendant's reputation in prison for being untruthful. Defendant also challenges the allowance of evidence over objection that he had a prior felony conviction and he had been imprisoned.

As we have stated:

In deciding whether trial counsel was ineffective and whether such ineffectiveness warrants a new trial, this court applies a two-pronged test: (1) was counsel's performance reasonable under all the circumstances, i.e. was it deficient? State v. Nash, 143 Ariz. 392, 694 P.2d 222 (1985) (applying to cases tried or pending on appeal on or after January 9, 1985), and (2) was there a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different," the prejudice

requirement. State v. Lee, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984) (quoting Strickland v. Washington, 466 U.S. 668, ___, 104 S. Ct. 2052, 2068, 80 L.Ed.2d 674, 698, (1984) (applied retroactively to cases after State v. Watson, 134 Ariz. 1, 653 P.2d 351 (1982))).

State v. Salazar, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). As we noted in State v. Beaty, No. CR 85-0211-PR, slip op. at 37 (filed May 5, 1988), in deciding an ineffectiveness claim, this court need not approach the inquiry in a specific order or address both prongs of the inquiry in a specific order if the defendant makes an insufficient showing on one. Salazar, 146 Ariz. at 541, 707 P.2d at 945.

In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we

expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland v. Washington, 466 U.S. at 698, 104 S. Ct. at 2069.

In the instant case we apply the prejudice component first. Assuming that counsel's performance was ineffective and considering the totality of the evidence before the jury, we do not believe counsel's alleged errors in the allowance of evidence as to defendant's character have affected the result of the proceeding. State v. Nirschel, 155 Ariz. 206, 209, 745 P.2d 953, 955 (1987). We find no error.

D. HOLDING

We have reviewed the record for fundamental error pursuant to A.R.S. § 13-4035, Anders v. California, 386 U.S. 738, 82 S. Ct. 1396 (1967) and State v.

Leon, 104 Ariz. 297, 451 P.2d 878

(1969). We find none.

The conviction and judgment of death is affirmed.

JAMES DUKE CAMERON, Justice

CONCURRING:

FRANK X. GORDON, JR., Chief Justice

STANLEY G. FELDMAN, Vice Chief Justice

WILLIAM A. HOLOHAN, Justice

JAMES MOELLER, Justice

APPENDIX B

SUPREME COURT
State of Arizona
201 West Wing State Capitol
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone: (602) 542-4536

Noel K. Dessaint
Clerk of the Court

Kathleen E. Kempley
Chief Deputy Clerk

April 12, 1989

RE: STATE OF ARIZONA vs. ORESTE C. FULMINANTE
Supreme Court No. CR-86-0053-AP
Maricopa County No. CR-142821

GREETINGS:

The following action was taken by the
Supreme Court of the State of Arizona on
April 11, 1989, in regard to the
above-referenced cause:

ORDERED: Motion for Reconsideration -
GRANTED.

Justice Corcoran recused himself and did
not participate in the determination of
this matter.

NOEL K. DESSAINT, Clerk

TO:

Robert K. Corbin, Esq., Attorney
General,

1275 W. Washington, Phoenix, AZ
85007 ATTN: Barbara A. Jarrett,
Esq.

Dean W. Trebesch, Esq. Maricopa County
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Suite-6, Phoenix, AZ 85004
ATTN: James H. Kemper, Esq., and
Stephen M.R. Rempe, Esq.

jd

APPENDIX C

[Filed July 11, 1989]

IN THE SUPREME COURT OF THE
STATE OF ARIZONA
In Banc

STATE OF ARIZONA,	)	Supreme Court
	)	No. CR-86-0053-AP
Appellee,)	
	)	Maricopa County
v.	)	No. CR-142821
)	
ORESTE C. FULMINANTE,	)	SUPPLEMENTAL
	)	OPINION
Appellant.)	
_____)	

Appeal from the Superior Court
of Maricopa County
The Honorable Stephen A. Gerst, Judge
Reversed and Remanded

Robert K. Corbin, Attorney General Phoenix
By: William J. Schafer III
 Barbara A. Jarrett
Assistant Attorneys General
Attorneys for Appellee

Stephen M.R. Rempe
Former Interim Maricopa County
Public Defender Phoenix
Dean W. Trebesch, Maricopa County
Public Defender
By: James H. Kemper and
 Stephen R. Collins
Deputy Maricopa County Public Defenders
Attorneys for Appellant

MOELLER, Justice

Following issuance of our opinion in this case, the defendant moved for reconsideration. The motion contends:

1. Federal constitutional law precludes this court from holding Fulminante's coerced confession to Anthony Sarivola, a government agent, to be harmless error;

2. Even assuming a coerced confession may properly be declared harmless, the court's harmless error analysis was incorrect;

3. We erred by concluding that the second confession was not fruit of the poisonous tree;

4. We erred by rejecting defendant's ineffective assistance of counsel claim;

5. We erred by declaring Arizona's death penalty statute constitutional;

6. We erred in our analysis of the statutory aggravating circumstance of

"especially cruel, heinous and depraved";

7. We improperly conducted our proportionality review.

We find no merit to any of the issues raised in the motion for reconsideration except the first. In our original opinion, we concluded that the state had not overcome Fulminante's prima facie showing of the involuntariness of his original confession to Sarivola, and, therefore, the statement to Sarivola should have been suppressed. However, we held the later, similar, and more explicit confession to Donna Sarivola was not fruit of the poisonous tree, and as such was properly admitted. Thus, we concluded that any error in the admission of the Sarivola confession was harmless beyond a reasonable doubt. To support that conclusion, we cited four federal circuit cases and one Arizona case, all holding that where a second confession

was properly received, the improper admission of an earlier confession was harmless error.

In his motion for reconsideration, however, the defendant correctly pointed out that the cases we relied upon to support our harmless error analysis were not cases in which the first confession was a coerced confession in violation of defendant's fifth amendment rights. Instead, these cases involved confessions obtained in violation of defendant's Miranda rights.

There is an unbroken line of authority supporting the rule that, although the receipt of a confession obtained in violation of Miranda may be harmless, the harmless error doctrine does not apply to coerced confessions. See, e.g., Mincey v. Arizona, 437 U.S. 385, 398, 98 S. Ct. 2408, 2416, 57 L. Ed. 2d 290, 303-04 (1978); Chapman v. California, 386 U.S.

18, 23 n.8, 87 S. Ct. 824, 828 n.8, 17 L. Ed. 2d 705, 710 n.8 (1967); Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 1780, 12 L. Ed. 2d 908, 915 (1964); Payne v. Arkansas, 356 U.S. 560, 568, 78 S. Ct. 844, 850, 2 L. Ed. 2d 975, 981 (1958); Miller v. Dugger, 838 F.2d 1530, 1535 n.10 (11th Cir.), cert. denied, ___ U.S. ___, 108 S. Ct. 2832, 100 L. Ed. 2d 933 (1988); Johnstone v. Kelly, 808 F.2d 214, 218 (2d Cir. 1986), cert. denied, 482 U.S. 928, 107 S. Ct. 3212, 96 L. Ed. 2d 699 (1987); United States v. DeParias, 805 F.2d 1447, 1456 (11th Cir. 1986); Williams v. Maggio, 727 F.2d 1387, 1389 (5th Cir. 1984); United States v. Davis, 617 F.2d 677, 695-96 (D.C. Cir. 1979); see also W. LaFave & J. Israel, 3 Criminal Procedure 277 (1984); Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 849; Project: Eighth Annual Review of Criminal Procedure:

United States Supreme Court and Court of Appeals 1977-78, 67 Geo. L.J. 317, 402 (1978).

The state urges us to ignore these cases and instead refers us to a few other cases, none of which persuade us that a coerced confession can be harmless error.¹ It is clear that federal constitutional law, as interpreted, pronounced, and applied by the United States Supreme Court and other federal courts compels us to conclude that the receipt of the original coerced confession may not be considered harmless error.

¹ The state did refer us to one case that held that the harmless error doctrine applied to coerced confessions; however, that court recognized the weight of authority contrary to its position, but contended that the contrary authority did not necessarily establish a per se rule. Harrison v. Owen, 682 F.2d 138, 140 (7th Cir. 1982). Because the holding in Owen is not supported by

The dissent to this supplemental opinion urges that coerced confessions may sometimes be considered harmless error.² The dissent, however, concedes that three decisions of the United States Supreme Court (Mincey, Jackson, and Payne) "have actually held that the admission of coerced confessions cannot be considered harmless error." State v. Fulminante, CR-86-0053-AP, supplemental opinion at ____ (Ariz. Sup. Ct. 1989) (Cameron, J. dissenting). The dissent, nevertheless, argues that because those cases involve facts more egregious than those presented by today's case, the words of the Supreme

(footnote continued)

legitimate authority and does not provide analysis of its own, we do not consider it persuasive.

2 The dissent cites Milton v. Wainwright, 407 U.S. 371, 92 S. Ct. 2174, 33 L. Ed. 2d (1972), to support the proposition that the harmless

Court might not apply here. We cannot agree.

The dissent's argument is based on the view that the coerced confession here is "at most, a confession obtained surreptitiously through an informant."

Id. at _____. We believe that is a mischaracterization of the coerced confession involved in this case. As the original opinion in this case points out:

Defendant contends that because he was an alleged child murderer, he was in danger of physical harm at the hands of other inmates. Sarivola was aware that defendant faced the possibility of retribution from other inmates, and that in return for the confession with respect to the victim's murder, Sarivola would protect him. Moreover the defendant maintains that Sarivola's promise was "extremely coercive" because

error analysis applies to non-brutal, non-egregious coerced confession cases. However, the fact is that Milton was decided on sixth amendment-~~Massiah~~ principles, to which the harmless error rule applies. Thus, Milton is inapposite.

the "obvious" inference from the promise was that his life would be in jeopardy if he did not confess. We agree.

11 Ariz. Adv. Rep. 7, 10 (June 16, 1988).

Thus, it is clear, and we have already expressly held, that the confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant's life was in jeopardy if he did not confess. This is a true coerced confession in every sense of the word. See Oregon v. Elstad, 470 U.S. 298, 312, 105 S. Ct. 1285, 1295, 84 L. Ed. 2d 222, 234 (1985) (implicitly recognizing coercion may exist where police use any "deliberate means calculated to break the suspect's will," even absent physical violence or impairment). Therefore, we believe that we are compelled to reject the argument that its admission was mere harmless error.

The law, as declared by the Supreme Court, is that a harmless error analysis is inapplicable to coerced confessions. A confession extracted by a government agent in return for a promise of protection from violence at the hands of other prisoners is undoubtedly a coerced confession. Therefore, until and unless the Supreme Court changes the law, we must order defendant retried without the use of the coerced confession.

Therefore, the defendant's conviction and sentence are set aside, and this case is remanded for a new trial without the use of the original coerced confession. Of course, this supplemental opinion does not preclude the use of defendant's second confession, since we adhere to our original view that it was not the fruit of the poisonous tree. Other than the single point discussed in this

supplemental opinion, all other aspects
of the original opinion remain intact.

JAMES MOELLER, Justice

CONCURRING:

FRANK X. GORDON, JR., Chief Justice

STANLEY G. FELDMAN, Vice Chief Justice

Justice William A. Holohan participated
in this matter but retired prior to the
filing of this supplemental opinion.
Justice Robert J. Corcoran did not
participate in the determination of this
matter.

CAMERON, J., dissenting.

I dissent. I believe the harmless error doctrine can be applied in this case. Admittedly, this view is a change from a previously held position. I believe, however, that changes in the law now allow the harmless error doctrine to be applied to coerced but reliable confessions.

At the time of Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967), and Harrington v. California, 395 U.S. 250, 87 S. Ct. 1726 (1969), the two leading United States Supreme Court cases on the exclusionary rule, it was generally assumed the confessions given in violation of Miranda were subject to the harmless error doctrine. The same could not be said for coerced confessions.

The introduction of involuntary or coerced confessions clearly calls for automatic reversal regardless of the amount of other evidence indicating guilt

. . . The Supreme Court has settled it as the law that involuntary confessions call for automatic reversal because the right not to be forced to testify against one's self is "basic to a fair trial." The Court may have been concerned about the likelihood that an accused may make an untrue confession in order to escape mental or physical abuse at the hands of his interrogators. It is likely that the Court felt that coerced confessions, although extremely unreliable, could have a determinative effect on the minds of the jurors, and thus felt it the safer rule to require reversal in all cases, rather than draw fine lines concerning the quantum of additional evidence necessary to render the error "harmless."

Cameron & Osborne, When Harmless Error Isn't Harmless, 1971 LAW & SOC. ORD. 24, 29-30. At this time, however, I question the blanket assumption that the admission of any coerced confession is per se harmful and therefore reversible.

In the instant case, the majority has stated that the erroneous admission of defendant's first confession to Sarivola, which was held to be involuntary, cannot

be considered harmless error. The majority states, "there is an unbroken line of authority supporting the rule that . . . the harmless error doctrine does not apply to coerced confessions." To support this proposition, the majority cites United States Supreme Court and other federal cases.

The federal cases cited by the majority are not sound authority for its ruling. Miller v. Dugger, 838 F.2d 1530, 1535-37 (11th Cir.), cert. denied, ___ U.S. ___, 108 S. Ct. 2832 (1988), involved a confession obtained in violation of Miranda, not a coerced confession. The court in Miller held that the defendant's confession was voluntary. Johnstone v. Kelly, 808 F.2d 214, 218 (2d Cir. 1986), cert. denied, 482 U.S. 928, 107 S. Ct. 3212 (1987), held that it was improper to apply a harmless error analysis to a denial of the right of self-representation.

In dicta, the court merely cited Payne v. Arkansas, 356 U.S. 560, 78 S. Ct. 844 (1958), for the proposition that harmless error does not apply to coerced confessions. United States v. DeParias, 805 F.2d 1447, 1456 (11th Cir.), cert. denied, Ramirez v. United States, 482 U.S. 916, 107 S. Ct. 3189 (1986), was not a coerced confession case either. The court found the confession to be voluntary, but in dicta cited Mincey v. Arizona as authority that harmless error does not apply to coerced confessions. Williams v. Maggio, 727 F.2d 1387, 1389-90 (5th Cir. 1984), involved only a claim that the confession was involuntary, which the court found to be unsupported by any evidence. Here too, the court in dicta cited Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964), and Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408 (1978), as authority

that harmless error does not apply to coerced confessions. Finally, in United States v. Davis, 617 F.2d 677, 695-96 (D.C. Cir. 1979), the court in dicta referred to Mincey and Jackson as holding that a coerced confession would require reversal. The court found, however, that the confession in question was voluntarily given.

Thus, of the citations given as support, only three have actually held that the admission of coerced confessions cannot be considered harmless error. Mincey, 437 U.S. at 398, 98 S. Ct. at 2416; Jackson, 378 U.S. at 376-77, 84 S. Ct. at 1780-81; Payne, 356 U.S. at 568, 78 S. Ct. at 850. Of these three cases, only Mincey is a post-Chapman, post-Miranda case. All of these cases involved confessions obtained under circumstances that resulted in the defendant being in a weakened, vulnerable

physical condition and the police using coercive pressure through intensive interrogation to elicit a confession.

In Payne, a pre-Chapman case, a "mentally dull" youth was arrested for murder without a warrant, denied a hearing and not informed of his right to remain silent or his right to counsel. 356 U.S. at 567, 78 S. Ct. at 849-50. The defendant was held incommunicado for three days during which family members who requested to see him were turned away and he was refused permission to make a phone call. Id. at 563, 78 S. Ct. at 848. The defendant was denied food for over twenty-five hours and then only given two sandwiches and not fed again for another fifteen hours. Id. at 564, 78 S. Ct. at 848. The police told the defendant that thirty to forty people were waiting outside to get him. Id. A police officer told the defendant that if

he would make a confession he would try to keep the mob away from him. Id. The Court found that because of the totality of this course of police conduct and particularly the culminating threat of mob violence, the confession had been coerced and did not constitute an "expression of free choice." Id. at 567, 78 S. Ct. at 850.

In Jackson, a pre-Miranda, pre-Chapman case, the defendant was involved in a gun battle with police after he robbed a hotel clerk. 378 U.S. at 370-71, 84 S. Ct. at 1777. He was shot twice, but managed to get to a hospital. Id. Jackson made incriminating statements to a detective and then hospital personnel gave him demerol, an analgesic sedative, and scopolamine, a drug used to dry up mouth secretion in preparation for surgery. Id. at 371, 84 S. Ct. at 1778. Police continued to interrogate him even

though by this time Jackson had lost 500 cc. of blood. Id. At one point Jackson said, "Look, I can't go on;" however, police continued to question him. Id. An hour after the questioning, doctors operated on him. Id. at 371-72, 84 S. Ct. at 1778. The Court reversed the denial of defendant's habeas corpus petition and remanded the case to the district court to allow the state a reasonable time to afford him a hearing on the voluntariness of his confession or a new trial. Id. at 391, 84 S. Ct. at 1788. The Court recognized that the facts could be interpreted to find that the confession was coerced as a result of the police tactics. Id. at 391, 84 S. Ct. 1788.

In Mincey, the defendant had unbearable pain in his leg, was in intensive care in the hospital and was depressed to the point of coma. Mincey, 437 U.S. at 398,

98 S. Ct. at 2416-17. The defendant was lying on his back, encumbered by tubes, needles, and breathing apparatus. Id. at 399, 98 S. Ct. at 2417. He clearly expressed his wish not to be interrogated. Id. When the detective began the interrogation, the defendant wrote: "This is all I can say without a lawyer." Id. The detective continued the interrogation despite Mincey's pleas to stop.

Moreover, he complained several times that he was confused or unable to think clearly, or that he could answer more accurately the next day. But despite Mincey's entreaties to be let alone, [Detective] Hust ceased the interrogation only during intervals when Mincey lost consciousness or received medical treatment, and after each such interruption returned relentlessly to his task. The statements at issue were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness.

Mincey, 437 U.S. at 400-01, 98 S. Ct. at 2418.

The Court said it was apparent that the defendant's statements were not the product of his free and rational choice. "Due process of law requires that statements obtained as these were cannot be used in any way against a defendant at his trial." Mincey, 437 U.S. at 402, 98 S. Ct. at 2418.

In each of these three "coerced confession" cases, the defendant was in a physically distraught condition, which the police took advantage of by interrogating the defendant despite the defendant's indications that he did not want to make a statement or confess. In each case, the Supreme Court recognized that coercion is more than police brutality, it can also result from relentless interrogation inflicted on a defendant in a physically-weakened

condition. Thus Payne, Jackson, and Mincey stand for the proposition that in these types of situations, confessions obtained by these means amount to coerced confessions that are not admissible and are not subject to the harmless error doctrine.

There have been, however, several cases involving involuntary confessions, sometimes characterized as "coerced," in which courts have applied a harmless error analysis. These confessions were considered coerced only in a technical sense and did not involve the egregious police methods or brutality characteristic of the true "coercion" cases. See, e.g., Milton v. Wainwright, 407 U.S. 371, 92 S. Ct. 2174 (1972) (assuming, arguendo, that confession obtained by police officer posing as an accused person confined in defendant's cell should have been excluded, record

clearly revealed that any error in its admission was harmless beyond a reasonable doubt).

Federal circuit courts have also considered this issue in several cases. See United States v. Carter, 804 F.2d 487 (8th Cir. 1986) (assuming defendant's statements were involuntary because police detective misled defendant into thinking that he was being questioned for an assault, not a murder, court concluded that their admission into evidence was harmless error beyond a reasonable doubt); Harrison v. Owen, 682 F.2d 138 (7th Cir. 1982) (admission of involuntary confession induced by alleged police representation that "consideration" would be given to defendant held to be harmless beyond a reasonable doubt); Meade v. Cox, 438 F.2d 323, 325 (4th Cir. 1971) (despite a dispute in the record about the voluntariness of the statement, court

finds its admission to be harmless error); United States ex rel. Moore v. Follette, 425 F.2d 925, 928 (2d Cir. 1970), cert. denied, 398 U.S. 966, 90 S. Ct. 2180 (1970) ("While the case where admission of an improperly obtained confession can be considered harmless error is exceedingly rare, this is one.").

State courts, including this court, have held the erroneous admission of involuntary confessions to be harmless error. State v. Castaneda, 150 Ariz. 382, 387, 724 P.2d 1, 6 (1986) (admission of defendant's statement regarding whereabouts of victim's body induced by police telling defendant they would bring his sister to the site if he refused to tell them where the body was, may have amounted to coercion, but any error in failing to suppress the statement was harmless beyond a reasonable doubt); People v. Gibson, 109 Ill. App. 3d 316,

440 N.E.2d 339 (1982) (defendant's incriminating statements given to his cellmate, a government informant who was also a convicted felon, were improperly admitted, but in view of other testimony, it was only cumulative and the error was harmless); Kelly v. State, 470 N.E.2d 1322 (Ind. 1984) (even if the defendant's statements were involuntary, reversal not required because any error in the admission of the challenged statements would be harmless); People v. Ferkins, 116 A.D.2d 760, 497 N.Y.S.2d 159 (1986) (court finds state did not prove admissions to be voluntary, however any error in their admission was harmless given the cumulative nature of the statements); State v. Johnson, 35 Wash. App. 380, 666 P.2d 950 (1983) (admission of defendant's written statement, which he alleged had been coerced, was harmless in any event); State v. Dean, 363 S.E.2d

467 (W. Va. 1987) (confession induced by promise of receiving psychiatric treatment considered involuntary, but its admission into evidence was harmless beyond a reasonable doubt).

I recognize the authority of Payne, Jackson and Mincey; however, I do not find the rule regarding involuntary confessions to be as clear cut as the majority makes it appear. See United States v. Murphy, 763 F.2d 202, 208 (6th Cir. 1985), cert. denied, Stauffer v. United States, 474 U.S. 1063, 106 S. Ct. 812 (1986) ("The Supreme Court has not squarely addressed the issue of whether admission of an involuntary confession may be harmless since its landmark holding in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), that a federal constitutional error can be held harmless.").

Two courts have addressed the issue of an involuntary confession induced by some type of promise and found the erroneous admission of the statements to be harmless error. In State v. Dean, an arson investigator investigated a fire in defendant's room at the YMCA. 363 S.E.2d 467, 468 (W. Va. 1987). By interviewing the defendant, the investigator learned that defendant was depressed and contemplating suicide. Id. He agreed to help defendant get psychiatric treatment and made inquiries on defendant's behalf. The investigator accompanied defendant to the Mental Health Center and upon arrival, defendant admitted to him that he had been involved in several other fires. Id. The trial court ruled that the statements were inadmissible because they had been induced by the investigator's promises to assist defendant in getting psychiatric

treatment. Id. at 469. Nonetheless, the West Virginia Supreme Court said:

We are aware that error in the admission of a coerced confession is not ordinarily subject to harmless error analysis. See Rose v. Clark, ___ U.S. ___, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). A rare exception to this rule has been recognized, however, where the involuntary confession is merely duplicative of other testimony or admissible statements of the accused. Harrison v. Owen, 682 F.2d 138 (7th Cir. 1982); Meade v. Cox, 438 F.2d 323 (4th Cir.), cert. denied, 404 U.S. 910, 92 S.Ct. 234, 30 L.Ed.2d 182 (1971); United States ex rel. Moore v. Follette, 425 F.2d 925 (2d Cir.), cert. denied, 398 U.S. 966, 90 S.Ct. 2180, 26 L.Ed.2d 550 (1970); State v. Johnson, 35 Wash.App. 380, 666 P.2d 950 (1983). See also Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972); United States v. Murphy, 763 F.2d 202 (6th Cir.1985), cert. denied, 474 U.S. 1063, 106 S.Ct. 812, 88 L.Ed.2d 786 (1986); State v. Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986). The standard for review in such cases is the same as in other cases of error of constitutional magnitude: "'Failure to observe a constitutional right constitutes reversible error unless it can be

shown that the error was harmless beyond a reasonable doubt.' Syl. pt. 5, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975)." Syllabus point 1, Maxey v. Bordenkircher, ____ W. Va. ____, 330 S.E.2d 859 (1985).

State v. Dean, 363 S.E.2d at 471

(footnote omitted).

In Harrison v. Owen, the defendant called his friend, told him he was involved in a killing and asked for advice. 682 F.2d 138, 139 (7th Cir. 1982). His friend negotiated with police and told defendant that the police promised "considerations and leniencies" if defendant would come forward and surrender. Id. Upon signing his confession, the police told him they couldn't come right out with a deal, but consideration would be given to him later. Id. The court found that the admission of defendant's incriminating statement was harmless beyond a reasonable doubt in light of the evidence

as a whole and testimony by defendant's friend and the police corroborating the incriminating statements. Id. at 142.

I find the analysis employed by the Eighth Circuit to be persuasive. The court recognized that a harmless error analysis should not apply only to certain types of coerced confessions. United States v. Carter, 804 F.2d 487 (8th Cir. 1986). In Carter, an FBI agent misled the defendant about the subject of the interrogation. He told the defendant that he was investigating an assault, although he was actually investigating a murder. 804 F.2d at 489. The defendant gave a false alibi that was later used to impeach his credibility. Id. When he found out the victim had died, he invoked his right to remain silent. Id. The court held that even assuming the statement was involuntary, the error in

admitting it was harmless. Id. The court noted:

Flittie v. Solem, 775 F.2d 933, 944 & N. 18 (8th Cir.1985) (en banc), cert. denied, ___ U.S. ___, 106 S.Ct. 1223, 89 L.Ed.2d 333 (1986), is not to the contrary. In Flittie we said: "If the statements were coerced, their admission could not have been harmless error." Ibid. Only if the word "coerced" is read to include deception, as opposed to physical or mental compulsion, would the harmless-error analysis be inappropriate in the present case. Such an extended reading of Flittie is not tenable, and would be contrary to Milton v. Wainwright, supra.

Carter, 804 F.2d at 489 n.3.

This meaning of "coerced" is consistent with the United States Supreme Court's interpretation in footnote one of Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, 520 (1986), which discusses various confession cases where police conduct was coercive. The Court found that all the cases it had considered in the last fifty years involved defendants

who were in weakened physical conditions and/or subjected to intensive and relentless police interrogation or coercive tactics. The Court also noted in footnote two that "[e]ven where there is causal connection between police misconduct and a defendant's confession, it does not automatically follow that there has been a violation of the Due Process Claus." Connelly, 479 U. S. at 164 n.2, 107 S. Ct. at 520 n.2; see Oregon v. Elstad, 470 U.S. 298, 305, 105 S. Ct. 1285, 1290 (1985) (fifth amendment not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion."); see also United States v. Murphy, 763 F.2d 202, 210 (6th Cir. 1985) (court applies harmless error analysis to confession where there was an element of coercion, but no police misconduct).

A case similar to the present case is People v. Gibson, 109 Ill. App. 3d 316, 440 N.E.2d 339 (1982). A government informant, also a convicted felon, was deliberately placed in defendant's jail and was asked by police if he would "pay attention" to anything the defendant might say regarding the murder. Id. at 322-23, 440 N.E.2d at 343-44. With his identity unknown to the defendant, the informant gained defendant's confidence and elicited incriminating statements from him. Id. at 323, 440 N.E.2d at 343. The court found the admission of the informant's testimony regarding defendant's statements to be clear error, but in view of the other testimony in the case, it was only cumulative, and the evidence, taken together, overwhelmingly established the defendant's guilt without the informant's testimony. Accordingly, the court held that the erroneous

admission of the testimony was harmless beyond a reasonable doubt. Id. at 324, 440 N.E.2d at 344.

A review of the case law mandates that a court should look to the circumstances surrounding the involuntary confession. If the confession was a result of the type of coercion found in Payne, Jackson and Mincey, then admission of the incriminating statement will constitute reversible error. If, however, the involuntary confession is only "coerced" in a technical sense, and is merely duplicative of other testimony or admissible statements of the defendant, then a harmless error analysis is appropriate.³ Additionally, if the

³ For cases holding that harmless error analysis is appropriate in involuntary confession cases if the statement is cumulative of other testimony or evidence against the defendant see Harrison v. Owen, 682 F.2d 138, 141 (7th Cir. 1982); Meade v. Cox, 438 F.2d 323, 325 (4th Cir. 1971);

record reveals overwhelming evidence of defendant's guilt, any error in admitting such statements may be considered harmless.⁴

(footnote continued)

People v. Gibson, 109 Ill. App. 3d 316, 324, 440 N.E.2d 339, 344 (1982); Kelley v. State, 470 N.E.2d 1322, 1325 (Ind. 1984); People v. Ferkins, 116 A.D.2d 760, 763, 497 N.Y.S.2d 159, 162 (N.Y. App. Div. 1986); State v. Johnson, 35 Wash. App. 380, 386, 666 P.2d 950, 953 (1983); State v. Dean, 363 S.E.2d 467, 471 (W. Va. 1987).

⁴ For cases holding that harmless error analysis is appropriate in light of overwhelming evidence of the defendant's guilt see Milton v. Wainwright, 407 U.S. 371, 372-73, 92 S. Ct. 2174, 2175-76 (1972) (three other confessions); United States v. Carter, 804 F.2d 487, 490 (8th Cir. 1986) (six witnesses against defendant); United States v. Murphy, 763 F.2d 202, 203, 210 (6th Cir. 1985) (massive circumstantial and corroborating evidence); United States ex rel. Moore v. Follette, 425 F.2d 925, 928 (2d Cir. 1970) (other confession, corroborating testimony from other witnesses covering every element of the crime, finding of stolen property in defendant's possession); State v. Castaneda, 150 Ariz. 382, 387, 724 P.2d 1, 6 (1986) (positive identification by witness and physical evidence connecting defendant to crime).

The confession in the present case, although considered involuntary, is not the type of "coerced" confession found in Payne, Jackson and Mincey. The record does not reflect that defendant was in any type of weakened condition when he confessed to Sarivola. Although Sarivola was a paid FBI informant, he was not a police officer. Police did not intentionally place Sarivola in defendant's cell. Rather, Sarivola had heard rumors that defendant was suspected of killing a child and told his FBI contact about it. Only then did the FBI agent tell Sarivola to find out about the rumor. The evidence does not indicate that the FBI agent ever told Sarivola to offer protection to defendant or threaten him in any way if defendant refused to divulge any information. The Arizona authorities were not involved at this time.

Sarivola did not subject defendant to any coercive, intensive interrogation. While defendant might not have confided in Sarivola had he known the information would be passed on, he did voluntarily tell Sarivola, in conversational tones, the circumstances surrounding the murder of his stepdaughter. This "involuntary" confession to Sarivola is not the type of coerced confession found in the cases of egregious police conduct the Supreme Court has addressed when it refused to apply the harmless error doctrine. It was at most, a confession obtained surreptitiously through an informant.

I believe defendant's "coerced" confession is merely cumulative to other admissible statements made by the defendant. Defendant's second confession to Donna Sarivola contained much of the same information as his confession to Anthony Sarivola. He told both of them

that he killed his stepdaughter, choked her, and made her beg for her life. He also expressed his hatred for his stepdaughter to each of them by telling Anthony Sarivola he "hated" her and referred to the victim as a "little fucking bitch" and by telling Donna Sarivola he wanted to "piss on her [the victim's] grave."

This is also a case where the record reflects overwhelming evidence of defendant's guilt. Defendant made inconsistent statements concerning the victim's disappearance. He said that he had a good relationship with the victim and that she had been instructed in the use of firearms. Defendant's wife contradicted these statements by testifying that he had a poor relationship with the victim and that the defendant had never instructed the victim in the use of firearms. The evidence

indicated that the day before defendant reported the victim's disappearance, he went to a Mesa gun shop to trade his rifle for an extra barrel for his .357 revolver. The evidence showed that the victim had been shot twice with a .357 revolver. Other physical evidence such as the wounds, ligature around the victim's neck, motorcycle tracks and the location of the crime scene all linked defendant to the murder.

The evidence, taken together, established defendant's guilt beyond a reasonable doubt without the use of defendant's confession to Sarivola. Thus, in light of all these facts and the absence of coercive police tactics in this case, I believe that the erroneous admission of defendant's involuntary confession to Sarivola was harmless beyond a reasonable doubt. The law does not require nor do the circumstances

justify reversing his conviction on this ground.

Apart from the facts in this case, I find no reason in logic or law to hold that a "coerced" confession can never be harmless. It cannot be said that there will never be a case in which facts are so overwhelming against a defendant that the error is not harmless beyond a reasonable doubt.

Further, I do not believe we can ignore the cost of applying the exclusionary rule in this case. The "coercion" in this case was not great. Comparing the costs and benefits, the costs are too great and the benefits negligible. Were I deciding this case on independent state grounds, I believe the cost of excluding the "coerced" confession is too great a price to pay for the meager benefit

obtained. See Cameron & Lustiger, The
Exclusionary Rule: A Cost-Benefit
Analysis, 101 F.R.D. 109 (1984).

JAMES DUKE CAMERON, Justice

APPENDIX D

SUPREME COURT
State of Arizona
201 West Wing State Capitol
1700 West Washington
Phoenix, Arizona 85007-2866
Telephone: (602) 542-4536

Noel K. Dessaint
Clerk of the Court

Kathleen E. Kempley
Chief Deputy Clerk

September 22, 1989

RE: STATE OF ARIZONA vs. ORESTE C.
FULMINANTE
Supreme Court No. CR-86-0053-AP
Maricopa County No. CR-142821

GREETINGS:

The following action was taken by the
Supreme Court of the State of Arizona on
September 19, 1989, in regard to the
above-referenced cause:

ORDERED: Motion for Reconsideration -
DENIED.

Justice Cameron voted to grant. Justice
Corcoran did not participate in the
determination of this matter.

Order Setting Aside Conviction and
Sentence and Remanding for New Trial
(Mandate) enclosed.

NOEL K. DESSAINT, Clerk

TO:

Robert K. Corbin, Esq., Attorney
General, 1275 W. Washington,
Phoenix, AZ 85007 Attn: Jessica
Gifford Funkhouser, Esq., and
Barbara A. Jarrett, Esq.
Dean W. Trebesch, Esq., Maricopa
County Public Defender, 132 S.
Central, Suite 6 Phoenix, AZ
85004 Attn: James H. Kemper,
Esq., and Stephen R. Collins, Esq.
Judith Allen, Clerk, Maricopa County
Superior Court, 201 W. Jefferson,
Phoenix, AZ 85003

em

APPENDIX E

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA IN AND FOR
THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)
)
Plaintiff,)
) CR-142821
vs.)
)
ORESTE C. FULMINANTE,)
)
Defendant.)
_____)

Phoenix, Arizona
December 11, 1985
1:55 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A.
GERST, JUDGE

Reporter's Transcript of Proceedings
Volume VI - Trial

Deborah M. Croci
Official Court Reporter

Arizona Attorney General
Appeals Division
(COPY)

Q. BY MR. SCULL: Tell us what he told you?

A. Well, quite a few nights after dinner, we used to go walking on the -- there's a track because it used to be the only big training grounds, so they have a big running track.

And we used to go walking around, and he was getting a -- starting to get some tough treatment and whatnot from the guys and I told him, you know, "You have to tell me about it," you know. I mean, in other words, "For me to give you any help." And he told me that he did in fact kill her.

Q. What did he tell you, as closely as possible the words that he used as he described this to you?

A. He told me that -- he said that he "clipped her."

Q. "Clipped her"?

A. "Clipped her."

Q. What does the term "clipped" mean?

A. "Clip" means to kill somebody.

Q. All right. Did he tell you anything else about it?

A. He said that he had took her out to the desert and he shot her twice in the head.

Q. Did he tell you why he did it?

A. He said that she was a little bitch and she was always in his way with his wife. She started a lot of trouble.

Q. Did he describe the surroundings in which he did this to her?

A. He said it was the desert and there was some rocks, you know, and sage brush and stuff like that and all I could know what he was saying is pictures from what I have seen on TV, because before that, I had never seen a desert except for around Las Vegas.

Q. All right. Did he say how he took her to the desert?

A. He said on a motorcycle.

Q. Did he say where his wife was at that time?

A. He said she was not at home. He was supposedly watching her or something like that.

Q. All right. Do you know where the wife was at that time?

A. No, I do not.

Q. Did he tell you that he did anything else to the child?

A. Well, he was talking something about her giving him head.

Q. What do you mean by that; you mean, oral sex?

A. Oral sex.

Q. He made her give him oral sex?

A. Something like that I recall. I do not exactly, you know, remember his exact words. Or --

Q. Do you have any recollection as to how he performed this or did this?

A. No, I do not.

Q. Did he say that he did anything else to the child besides shooting her and the sexual assault?

A. He said that he choked her and made her beg a little bit.

Q. Did he say how he choked her?

A. No he didn't.

Q. Did he ever describe a weapon to you?

A. Yes. A .357 magnum Dan Wesson revolver.

Q. Do you remember talking specifically about that kind of revolver?

A. Yes, I do.

Q. Did he tell you anything unique about that kind of revolver?

A. That he had bought another barrel for the weapon.

Q. And did he tell you that he used that in any way or not?

A. He said he did not use the other barrel.

Q. Did he ever tell you what happened to the weapon?

A. He -- as far as I can remember, is that he left the weapon out in the desert somewhere.

Q. Now, what kind of reputation, if you know, did Mr. Fulminante have around the prison for being truthful and honest?

A. Well, most people believed him not to be truthful.

Q. Now, what makes you think he was telling you the truth at this time?

A. Because one of the few times he became serious and he was and not trying to put up a front about it.

Q. Did he ever tell you there was a pile of rocks by where he killed her?

A. Yes, he said something about a pile of boulders.

Q. What kind of relationship did he describe to you that he had with this girl?

A. Very lousy relationship. He thought that she was always in the way between him and his wife, and she was a little bitch.

Q. And how did he refer to her in these conversations?

A. Usually a little fucking bitch. Those were usually his words towards her.

Q. Did Mr. Fulminante express any remorse to you about this killing?

A. No, he did not sir.

Q. Did he ever on any subsequent occasion?

A. No, he did not.

Q. Did you talk about this on any subsequent occasions?

A. Yes, we have touched on it a few times before I actually departed from prison.

Q. Did he ever tell you where the gun was hidden?

A. Somewhere by that pile of rocks.

Q. Did he ever make any statements about the authorities being unable to find it?

A. Yes. He always said that they were too fucking stupid to get him, that they never knew where to look, and -- but he did say that they were constantly applying pressure and he was very, very worried it would be waiting for him when he got out of Raybrook.

. . .

Q. BY MR. KOOPMAN: Okay. Mr. Sarivola, you have a group of men who are doing time in prison; is that correct?

A. That's correct, sir.

Q. Some of them have committed murder, burglary, robbery; correct? Extortion?

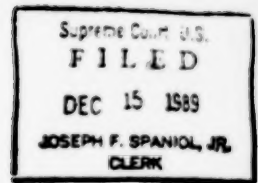
A. That's correct.

Q. If a prisoner, if a fellow prisoner is known to have sexually assaulted and murdered a little child, is he considered accepted by the general population or is he ostracized and possibly in danger from the general population?

A. The latter part, ostracized and possibly in danger.

6

ORIGINAL



20-839

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF ARIZONA,

Petitioner,

-VS-

ORESTE C. FULMINANTE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE ARIZONA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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State Bar Attorney No. 006169

Attorney for RESPONDENT

*Counsel of Record

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QUESTIONS PRESENTED

1. Did the Arizona Supreme Court err in applying the totality of the circumstances test to a coerced confession?
2. Can a conviction be allowed to stand that is based on a coerced confession?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF ARIZONA,

Petitioner,

-vs-

ORESTE C. FULMINANTE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Oreste C. Fulminante, through undersigned counsel, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of both the original opinion of the Arizona Supreme Court dated June 16, 1988, and the supplemental opinion of the Arizona Supreme Court dated July 11, 1989.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the first question presented in the petition.

Petitioner contends the Arizona Supreme Court erred in the original opinion by failing to consider the voluntariness of respondent's confession under the "totality of the circumstances" test. Petitioner states:

. . . the Arizona Supreme Court erroneously relied on Malloy v. Hogan, 378 U.S. 1 (1964) and Bram v. United States, 168 U.S. 532 (1897), in applying a "but-for" test to Fulminante's confession. Petition at 14.

This misstates the holding in the original opinion. The Arizona Supreme Court did not apply a "but-for" test, as the court specifically stated:

. . . the voluntariness of a confession, however, must be viewed in a totality of the circumstances . . . Petitioner's Appendix A at 20. (Emphasis added.)

Thus, there is no viable issue regarding the "application of the proper test."

In essence, petitioner contends that this Court should grant certiorari and make its own factual determination as to whether the confession was the result of threats or physical injury or death. It is well established that this Court does "not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925). Thus, this Court should not consider this issue.

Even if this Court would determine it is appropriate to analyze the facts, it is unnecessary in this case as it is absolutely clear that the confession was coerced. The majority of the Arizona Supreme Court in the supplemental opinion states:

. . . it is clear, and we have already expressly held, that the confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant's life was in jeopardy if he did not confess. Petitioner's Appendix C at 9.

Justice Cameron, who was the lone dissenter in the supplemental opinion, was the Justice who wrote the original opinion. The

majority notes that in the original opinion Justice Cameron states:

Defendant contends that because he was an alleged child murderer, he was in danger of physical harm at the hands of other inmates. Sarivola [government informant] was aware that defendant faced the possibility of retribution from other inmates, and that in return for the confession with respect to the victim's murder, Sarivola would protect him. Moreover the defendant maintains that Sarivola's promise was "extremely coercive" because the "obvious" inference from the promise was that his life would be in jeopardy if he did not confess. We agree. 11 Ariz. Adv. Rep. 7, 10 (June 16, 1988). Petitioner's Appendix C at 8-9.

Thus, not only the majority, but even the dissenting Justice stated that respondent's life was in danger if he did not confess. As the majority states:

This is true coerced confession in every sense of the word.
Petitioner's Appendix C at 9.

Petitioner asks this Court to find that Fulminante would have confessed even in the absence of the threat of physical harm, and that therefore, the confession was voluntary. Petitioner contends that Fulminante confessed to the government informant solely because they were on friendly terms. The record does not support this contention. Indeed, if this was true, there was no need for the government informant to offer protection from physical harm in exchange for a confession. In any event, this Court should not grant certiorari in order to weigh the facts presented in the trial court.

2. No reason exists for the grant of certiorari on petitioner's second question as this Court has previously ruled on this issue.

Petitioner contends certiorari should be granted to determine if harmless error analysis can be applied where a "true" coerced confession has been admitted at trial. Certiorari need not be granted as this Court has previously ruled on this issue.

The United States Supreme Court has been unequivocal for over 90 years in holding that a conviction cannot be allowed to stand if based in any part on a "coerced" confession. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 578 (1897). This Court has clearly stated this principle in no fewer than 25 opinions.¹ The opinions make it absolutely clear that no matter how sufficient the evidence aside from the confession, the harmless error doctrine cannot apply in such a situation.

In Bram v. United States, this Court discusses the admission of a coerced confession and states:

If found to have been illegally admitted, reversible error will result, since the prosecution cannot, on the one hand, offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and the other hand, for the purpose of avoiding the consequence of the error caused by its wrongful admission, be heard to assert that the matter offered as a confession was not

¹ Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 578 (1897); Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940); Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941); Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944); Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944), rehearing denied, 323 U.S. 809, 65 S.Ct. 26, 89 L.Ed. 645; Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); Malley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948); Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949); Gallegos v. Nebraska, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86 (1951); Stroble v. California, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1952), rehearing denied, 343 U.S. 952, 72 S.Ct. 1039, 96 L.Ed. 1353; Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), rehearing denied, 73 S.Ct. 827, two cases, 345 U.S. 946, 97 L.Ed. 1370; Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959); Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960); Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961); Lynum v. Illinois, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); New Jersey v. Portash, 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979); Connecticut v. Johnson, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983); Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).

prejudicial, because it did not tend to prove guilt.
18 S.Ct. at 186.

Thus, the admission of a coerced confession cannot be harmless error.

This Court has never made exceptions to the above principle. This Court has not stated that a conviction based on a coerced confession may stand if there is a second admissible confession; or if there are ten eyewitnesses; or even if the crime itself was filmed. The principle is absolute. In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), this Court states:

. . . there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, . . .

* * *

8. See, e.g., Payne v. State of Arizona, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (coerced confession) . . . 87 S.Ct. at 827-828. (Emphasis added.)

Wells v. United States, 407 A.2d 1081 (1979) discusses the above principle and states:

See generally C. McCormick, Evidence Sections 147-50 (2d ed. 1972); 3 J. Wigmore, Evidence Sections 821-26 (Chadbourn rev. 1970). This constitutional tenet is so strong that a conviction, founded in part upon the evidence of an involuntary confession, must be set aside even if the evidence part from the confession was more than sufficient to uphold a jury's verdict of guilt. See, e.g., Malinski v. New York, 324 U.S. 401, 404, 65 S.Ct. 781, 89 L.Ed. 1029 (1945). Although the common law justified the exclusion of coerced confessions on the ground that they were "testimonial untrustworthy," 3 Wigmore, supra Section 822, the decision under the Constitution have eschewed strict reliance upon this rationale in favor of the due process guaranty. See Ritz, Twenty-five Years of State Criminal Confession of Cases in the U.S. Supreme Court, 19 Wash. & Lee L.Rev. 35, 43-51 (1962). Thus the Supreme Court has held that an involuntary confession is inadmissible without regard to its truth or falsity. Rogers v. Richmond, 365 U.S. 534, 540-41, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). . . . 407 A.2d at 1085.

The United States Supreme Court has held in five cases that where a coerced confession is admitted at trial, it is irrelevant if there are other properly admitted confessions. Haynes v.

Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); Stroble v. California, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1952), rehearing denied 343 U.S. 952, 72 S.Ct. 1039, 96 L.Ed. 1353; Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265; Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975.

Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), involves a situation where a "coerced" confession was admitted at trial. In that case, this Court states:

It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, . . . and even though there is ample evidence aside from the confession to support the conviction.

84 S.Ct. at 1780. (Emphasis added.)

This Court goes on to state:

It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," . . . 84 S.Ct. at 1785.

In Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), this Court states:

Statements made by a defendant in circumstances violating the strictures of Miranda v. Arizona, supra, are admissible for impeachment if their "trustworthiness . . . satisfied legal standards." . . . But any criminal trial use against a defendant of his involuntary statement is a denial of due process of law, "even though there is ample evidence aside from the confession to support the conviction" . . . If therefore, Mincey's statements to Detective Hust were not "the product of a rational intellect and a free will," . . . his conviction cannot stand. . . . 98 S.Ct. at 2416. (Emphasis added.)

Thus, this Court has made it extremely clear that although a confession obtained solely in violation of Miranda may be used at

trial for limited purposes, a conviction cannot be allowed to stand if a "coerced" confession is admitted at trial. In other words, admission of a "coerced" confession cannot be harmless error no matter how overwhelming the evidence against a defendant. This is true even if a second confession constitutes part of that overwhelming evidence.

In Lynumn v. Illinois, 372 U.S. 527, 83 S.Ct. 917, 9 L.Ed.2d 922, the defendant was convicted after a coerced confession was admitted at trial. The United States Supreme Court notes that the Illinois Supreme Court had previously held that even if the confession was erroneously admitted, "the error was a harmless one" in light of other evidence of the defendant's guilt. This Court then states:

That is an impermissible doctrine. As was said in Payne v. Arkansas, "this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment." 356 U.S. 560, at 568, 78 S.Ct. 844, 850, 2 L.Ed.2d 975. 83 S.Ct. at 922.

Therefore, it is clear that the harmless error doctrine cannot be applied to the instant case.

In the 1986 case, Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460, this Court states:

Despite the strong interests that support the harmless-error doctrine, the Court in Chapman recognized that some constitutional errors require reversal without regard to the evidence in the particular case. 386 U.S. at 23, n. 8, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065, citing Payne v. Arkansas, . . . (introduction of coerced confession) . . . This limitation recognizes that some errors necessarily render a trial fundamentally unfair. 92 L.Ed.2d 470. (Emphasis added.)

In a concurring opinion, Justice Stevens states:

[V]iolations of certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial. .

. . The admission of a coerced confession can never be harmless even though the basic trial process was otherwise completely fair and the evidence of guilt overwhelming.

* * *

3. See Payne v. Arkansas . . . ("[T]his Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment") . . . 92 L.Ed.2d at 476-77. (Emphasis added.)

The opinion continues:

In short, as the Court has recently emphasized, our Constitution, and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination. Id. at 477. (Footnote omitted.)

Rose v. Clark, again makes it absolutely clear that a conviction has to be vacated if a coerced confession is admitted at trial no matter how overwhelming the other evidence. There clearly is no exception to this rule.

In Haynes v. Washington, a coerced confession was admitted at trial of a defendant on a robbery charge. This Court stated that "substantial independent evidence" of guilt existed apart from the coerced confession. This evidence included two prior confessions by the defendant which were determined to be admissible, and identification of defendant as one of the robbers by eyewitnesses. Despite the two admissible confessions, this Court held that the convictions had to be vacated because of the admission of the coerced confession.

In reaching its decision in Haynes, this Court considered its prior holding in Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760, in which a coerced confession was admitted at trial.

In Rogers, this Court states:

Our decisions under that Amendment [Fourteenth] have made it clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the

product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system -- a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. See Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166; Rochin v. People of California, 342 U.S. 165, 172-174, 72 S.Ct. 205, 209-210, 96 L.Ed. 183; Spano v. People of State of New York . . . Blackburn v. State of Alabama, 361 U.S. 199, 206-207, 80 S.Ct. 274, 279-280, 4 L.Ed.2d 242. And see Watts v. State of Indiana, 338 U.S. 49, 54-55, 69 S.Ct. 1347, 1350, 1357, 93 L.Ed. 1801. 81 S.Ct. at 739-40.

This Court goes on to state:

To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees. Id. at 740.

Accordingly, the conviction in Rogers was vacated because of the admission of the coerced confession.

Stroble v. California, involves a trial in which an alleged coerced confession was admitted. The California Supreme Court had previously determined that the confession was involuntary, but that the confession "could not have affected the fairness of [petitioner's] trial," because petitioner "thereafter made at least five confessions of materially similar substance and unquestioned admissibility, which were put in evidence." The California Court

went on to state that "[i]t does not appear the outcome of the trial would have differed" if the coerced confession had been excluded. 72 S.Ct. at 603. Therefore, the California Court concluded that the use of the confession had not deprived petitioner of due process.

Despite the five admissible confessions, the United States Supreme Court in Stroble states:

If the confession which petitioner made in the District Attorney's office was in fact involuntary, the conviction cannot stand, even though the evidence apart from that confession might have been sufficient to sustain the jury's verdict. Malinski v. New York, 1945, Lyons v. Oklahoma, 1944, 322 U.S. 596, 597 note 1, 64 S.Ct. 1208, 1210, 88 L.Ed. 1481. Id. at 603.

Thus, this Court has made it absolutely clear that a conviction must be vacated if a coerced confession is admitted at trial even if there are five additional voluntary confessions properly admitted at trial. Therefore, in the instant case, the convictions should be reversed even though a second purportedly voluntary confession was admitted at trial.

In Malinski v. New York, the defendant was convicted of the murder of a police officer. Testimony was presented at trial that prior to his arrest, the defendant made confessions to his girlfriend, his brother-in-law and to a friend of the defendant's. There was no dispute that these confessions were voluntary and properly admitted at trial.

After defendant's arrest, the police obtained two alleged coerced confessions from him. The United States Supreme Court specifically found that the first police confession was coerced. At trial, subsequent confessions were also admitted. The admissibility of these confessions was not in dispute.

The New York Court of Appeals had previously found that the unchallenged confessions and other evidence were sufficient to

support the conviction wholly apart from the contested confession. The United States Supreme Court clearly found the above finding to be irrelevant, stating:

If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. Ashcraft v. Tennessee, supra, page 154 of 322 U.S., page 926 of 64 S.Ct., 88 L.Ed. 1192. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. Lyons v. Oklahoma, 322 U.S. 596, 597, 64 S.Ct. 1208, 1210, 88 L.Ed. 1481. 65 S.Ct. at 783.

This Court goes on to state:

It is thus apparent that the judgment before us rests in part on a confession obtained as a result of coercion. Accordingly a majority of the Court do not come to the question whether the subsequent confessions were free from the infirmities of the first one. Id. at 786.

Accordingly, the judgment against Malinski was vacated. Thus, the conviction of the instant case should also be vacated.

In Spano v. New York, the defendant was charged with shooting the victim to death. Prior to arrest, the defendant telephoned a close friend who was attending the police academy and told him that the defendant had received a "terrific beating" from the victim. The defendant then confessed that "he went and shot at him [victim]." As there was no dispute that the victim was shot to death, the above statement constituted a full confession. There was also an eyewitness who testified that the defendant had murdered the victim.

After the defendant's arrest, the police obtained a second, "coerced," confession which was admitted at trial. This Court notes:

The State suggests, however, that we are not free to reverse this conviction, since there is sufficient other evidence in the record from which the jury might have found guilt . . . 79 S.Ct. at 1208.

Indeed, the evidence of guilt in Spano was overwhelming even in the absence of the second "coerced" confession. The first confession and the eyewitness testimony was "sufficient other evidence in the record from which the jury might have found guilt."

Despite the overwhelming evidence of guilt, this Court held that the conviction had to be reversed, because a coerced confession was admitted at trial. This Court states:

[W]e find the use of the confession obtained here inconsistent with the Fourteenth Amendment under traditional principles.

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. 79 S.Ct. at 1205-6.

The holding in Spano makes it absolutely clear that in the instant case, even though there was a second allegedly voluntary confession, the conviction must still be reversed.

In Chapman v. California, the United States Supreme Court notes that under the holding in Payne v. Arkansas, admission of a coerced confession can never be considered harmless error. In his concurring opinion in Chapman, Justice Stewart states that the inapplicability of the harmless error rule to coerced confessions does not turn on their evidentiary impact. Rather, the constitutional right involved is so fundamental and absolute that it will not permit courts to indulge in nice calculations as to the harm arising from its denial.

In Payne v. Arkansas, this Court held that a conviction had to be vacated because a "coerced" confession had been admitted at trial. This Court held that the admission of the coerced confession vitiates the judgment of guilt because it violates the

Due Process Clause of the Fourteenth Amendment. After retrial, the case was considered on appeal by the Supreme Court of Arkansas. Payne v. State, 332 S.W.2d 233 (1960). The Arkansas Court discusses the fact that aside from the first "coerced" confession, there was a reenactment of the crime which constituted a second confession. 332 S.W.2d at 235. The dissenting opinion notes that in the United States Supreme Court opinion in Payne v. Arkansas, there is no mention whatsoever of the second confession. 332 S.W.2d at 236.

The state court in Payne considered the issue of whether or not the second confession was voluntary and thus admissible at trial. Obviously, as the United States Supreme Court did not discuss the second confession at all, this Court was not concerned whether the second confession was voluntary. In light of this fact and the fact that this Court vacated the conviction, the only logical conclusion is that this Court held that the conviction based on a coerced confession had to be vacated even if there was a second admissible confession.

Petitioner relies upon the dissent of Justice Cameron in the supplemental opinion of the Arizona Supreme Court. Justice Cameron wrote the original opinion in which he erroneously equated confessions obtained as a result of physical coercion with Miranda violations. The majority in the supplemental opinion notes that in the original opinion, the cases relied upon by Justice Cameron to support a harmless error analysis:

. . . were not cases in which the first confession was a coerced confession in violation of defendant's fifth amendment rights. Instead, these cases involved confessions obtained in violation of defendant's Miranda rights.

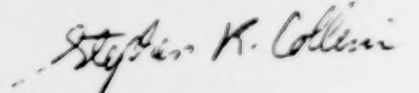
Petitioner's Appendix C at 4.

It is also clear that Justice Cameron's later "authority" does not support petitioner's position.

CONCLUSION

As neither the decision below nor the record raises the first question presented in the petition and as this Court has previously ruled on the second question presented, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

STEPHEN R. COLLINS, being first duly sworn upon oath, deposes and says:

That he served the attorneys for the petitioner in the foregoing case by forwarding 3 copies of the **RESPONDENT'S BRIEF IN OPPOSITION**, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

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this 15th day of December, 1989.


STEPHEN R. COLLINS

SUBSCRIBED AND SWORN to before me this 15th day of December, 1989.


BRENDA BIRKHIMER
NOTARY PUBLIC

My Commission Expires:

My Commission Expires June 29, 1991

MAY 10 1990

JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1989

STATE OF ARIZONA,

Petitioner,

vs.

ORESTE C. FULMINANTE,

Respondent.

On Writ Of Certiorari To The Arizona Supreme Court

JOINT APPENDIX

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NOVEMBER 17, 1989
CERTIORARI GRANTED MARCH 26, 1990

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Superior Court of Arizona, County of Maricopa

No. CR 142821

Relevant Docket Entries

<u>Date</u>	<u>NR.</u>	<u>Proceedings</u>
Sept. 4, 1984	1	Grand Jury Indictment
Oct. 25, 1985	36	[Defendant's] Motion to Suppress Admissions and/or Confessions
Oct. 30, 1985	38	[State's] Response to Motion to Suppress
Nov. 7, 1985	43	[Defendant's] Reply to Response on Motion to Suppress
Nov. 8, 1985		Minute Entry [Denying Motion to Suppress]
Nov. 25, 1985	53	[Defendant's] Motion for Reconsideration on Motion to Suppress
Nov. 27, 1985	56	[State's] Response to Motion for Reconsideration on Motion to Suppress
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Sept. 19, 1989	62	Ordered: [State's] Motion for Reconsideration – Denied
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IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
Plaintiff,	)	NO. CR 142821
	)	56 GJ 322
vs.)	
ORESTE FULMINANTE,	)	INDICTMENT
Defendant.	)	FIRST DEGREE
	)	MURDER,
	)	A Class 1 Felony.

The Grand Jurors of Maricopa County, Arizona, accuse ORESTE FULMINANTE, on this 4th day of SEPTEMBER, 1984, charging that in Maricopa County, Arizona:

ORESTE FULMINANTE, on or about the 13th day of SEPTEMBER, 1982, intending or knowing that his conduct would cause death, with premeditation caused the death of JENEANE MICHELLE HUNT, in violation of A.R.S. §§ 13-1105, 13-1101, and 13-703.

	/s/ A True Bill ("A True Bill")
THOMAS E. COLLINS MARICOPA COUNTY ATTORNEY	SEPTEMBER 4, 1984 Date
/s/ K. C. Scull K. C. SCULL DEPUTY COUNTY ATTORNEY	/s/ George Eichman GEORGE EICHMAN FOREMAN OF THE GRAND JURY

FRANCIS P. KOOPMAN
1444 North 16th Street
Phoenix, Arizona, 85006
602-256-0757

Attorney for Defendant

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	:	NO CR-142821
Plaintiff,	:	
-v-	:	
ORESTE FULMINANTE,	:	MOTION TO
Defendant.	:	SUPPRESS
	:	ADMISSIONS
	:	AND/OR
	:	CONFESSIONS
	:	(Oral Argument
	:	Requested)
	:	(Assgd. to
	:	Hon. S. Gerst)
- - - - -	:	

COMES NOW the Defendant by and through his attorney undersigned and hereby moves this Court for an Order suppressing the alleged admission and/or confession made by the Defendant to Anthony Sarivola on October 20, 1983, and allegedly repeated to Donna Sarivola on or about May of 1984. This motion is based upon the Memorandum of Points and Authorities attached hereto.

RESPECTFULLY SUBMITTED this 25th day of October, 1985.

/s/ Francis P. Koopman
 FRANCIS P. KOOPMAN
 Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

THE following facts are admitted solely for the purpose of this argument only and are not to be construed as admission of their validity.

SOME time in April of 1983 Anthony Sarivola, a Mafia associate of the Columbo crime family, approached F.B.I. Agent Walter Ticano and offered to become a paid confidential informant. Thereafter, Sarivola was incarcerated at the Federal Correctional Institution at Ray Brook, New York. The Defendant was already a prisoner thereat.

ON October 20, 1983, Agent Ticano met with Sarivola at the prison to obtain information relating to prison personnel. During this briefing, Sarivola told Ticano he "thought" that Fulminante may have killed a girl in Arizona. Ticano told Sarivola he had to come up with stronger information than just his own beliefs and advised Sarivola to do some more work on Fulminante. Later that day (according to Ticano and substantiated by F.B.I. reports), Sarivola called Ticano and told him that he had gotten Fulminante to confess to the murder of his step-daughter. (In an interview with the undersigned, Sarivola states that the confession and subsequent call to Ticano took place several days later.) Sarivola admits that he purposely interrogated Fulminante about the murder in order to develop information for the F.B.I and that, in return for Fulminante's admission to him, Sarivola would

give Fulminante his personal protection from any harm by other prisoners.

SARIVOLA was released from prison some time in November of 1983 and kept in contact with Fulminante. When Fulminante was released from prison in May of 1984, he was allegedly driven to Pennsylvania from New York by Sarivola who was accompanied by his wife, Donna Sarivola. During this ride, Donna Sarivola questioned Fulminante about his family in Arizona and through continued questioning over a period of one half hour allegedly got Fulminante to admit to the rape and murder of his step-daughter. Anthony Sarivola was still a paid confidential informant for the F.B.I at that time.

LAW

UNLESS law enforcement officers advise defendant in custody of Miranda rights before questioning him, any statement made by person in custody is inadmissible against him at trial even though the statement may in fact be wholly voluntary. U.S.C.A. Const. Amend. 5 & 6, A.R.S. Const. Art. 2, Sec. 10; *State v. Montes*, 136 Ariz. 491, 667 P.2d 191; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602. In the case at hand, Defendant Fulminante was incarcerated at Ray Brook Prison during his F.B.I. encouraged interrogation by Anthony Sarivola, a paid informant and agent of the government, whose sole and admitted purpose at that time was to get Fulminante to confess to the homicide in order to assist the F.B.I in its investigation. During an interview of F.B.I. Agent Ticano on October 21, 1985, Agent Ticano corroborated this set of events. At no time was Fulminante advised of his *Miranda* rights.

"AT this point it should be emphasized that law enforcement officials have the right, and indeed the obligation in the prosecution of crime to use all information that comes into their hands pointing to the guilt of an accused. This is true even though the persons supplying that information may harbor expressed or unexpressed motives of expectation of lenient treatment in exchange for such information. It is only when the state actively enters into the picture to obtain the desired information in contravention of constitutionally protected rights that the sanction of inadmissibility become pertinent. It is not that the information is any less material or valuable to the finding of truth, it is the concept that *the state's overriding of an individual's constitutionally-based rights will not be tolerated*. In this arena of contesting interests, i.e., where probative evidence and individual rights become mutually exclusive, *our courts have decreed that individual rights must prevail*." *State v. Smith*, 107 Ariz. 100, p.103; 482 P.2d 863. (Emphasis added)

THE undersigned submits that, based on the facts and the law submitted, the October 20, 1983, alleged admission/confession must be suppressed. The question then arises whether the subsequent admission/confession allegedly made in May of 1984 to Donna Sarivola in the presence of Anthony Sarivola while Fulminante was no longer incarcerated is also inadmissible. The undersigned submits that the answer is "yes" based on the principles of the fruit of the poisonous tree doctrine (see *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407).

WHILE admittedly Donna Sarivola was not an agent of the government at the time of the second interrogation and Fulminante was not in custody, it is obvious that, if

indeed Fulminante made incriminating statements, it was because he was aware that Anthony Sarivola allegedly already knew about his misconduct and therefor he had no reason to hide anything from either of the Sarivolas. Anthony Sarivola substantiated this line of thinking on the part of Fulminante during an interview conducted on October 22, 1985.

IT should be further noted that when Fulminante made his first alleged confession to Anthony Sarivola, it was based on Sarivola's promise to protect Fulminante and prevent any reprisals against him because of his involvement in the death of the child. Fulminante obviously relied on those promises and continued to rely on those promises when he made his second statement to Donna Sarivola. A confession induced by direct or implied promise, however slight, is involuntary (see *State v. Hensley*, 137 Ariz. 80, 669 P.2d 58). The Court, therefor, must determine whether the second confession was the product of an essentially free and unconstrained choice by Fulminante or whether his reliance on the promise of protection by an alleged Mafia representative overcame his will and his capacity for self-determination was critically impaired. (See *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041) Confessions are prima facie involuntary and burden is on state to show that they were freely and voluntarily made and that they were not the product of physical or psychological coercion. *State v. Schad*, 129 Ariz. 557, 663 P.2d 366; *State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023.

WHEREFORE, based on the foregoing, the undersigned respectfully moves this Court for an Order suppressing any and all statements, whether confessions or

admissions, made to either Anthony or Donna Sarivola, for the reasons that the first statement was in violation of *Miranda* and both statements were involuntary and untrustworthy, and/or the second statement was the fruit of the poisonous tree.

RESPECTFULLY SUBMITTED this 25th day of October, 1985.

/s/ Francis P. Koopman
 Francis P. Koopman
 1444 North 16th Street
 Phoenix, Arizona, 85006
 602-256-0757
 Attorney for Defendant

Original of the foregoing
 filed this 25th day of
 October, 1985, with:

Clerk of the Superior Court
 201 West Jefferson
 Phoenix, Arizona, 85003

Copy of the foregoing ~~mailed~~/
 hand-delivered this 25th day
 of October, 1985, to:

The Honorable Stephen Gerst
 Judge of the Superior Court

K. C. Scull
 Deputy County Attorney

/s/ Francis P. Koopman
 FRANCIS P. KOOPMAN

IN THE SUPERIOR COURT OF THE
 STATE OF ARIZONA
 IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
Plaintiff,	)	NO. CR 142821
vs.	)	RESPONSE TO
ORESTE FULMINANTE,	)	MOTION TO
Defendant.	)	SUPPRESS
	)	(Assigned to the
	)	Honorable
	)	Stephen Gerst,
	)	Div. 42)

COMES NOW the State of Arizona, by and through undersigned deputy, and urges the Court to deny defendant's Motion To Suppress based upon the Memorandum of Points and Authorities attached hereto.

Respectfully submitted this 30th day of October, 1985.

THOMAS E. COLLINS
 MARICOPA COUNTY
 ATTORNEY

BY /s/ K.C. Scull
 K.C. Scull
 Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

The defendant has submitted a statement of facts for purposes of arguing his motion. The State takes issue with some of the assumptions made by the defendant. It is a fact that Anthony Sarivola was at all times pertinent to this case a paid confidential informant for the F.B.I. He was an informant in matters that related to organized crime in the Brooklyn, New York City area. It is also true that while incarcerated in Raybrook Prison in upstate New York various rumors reached Mr. Sarivola that Oreste Fulminante had killed his step-daughter in Arizona.

Initially these were rumors and initially the truth of the rumors was denied by the defendant. It is also true that Mr. Sarivola passed the rumors on to the F.B.I. Upon being informed of those rumors, the F.B.I. Agent, Mr. Walter Ticano, supposedly said "... that's just a rumor, you'll have to find out more about it ..." before I can act upon it, or words to that effect. The witness, Anthony Sarivola, went back to the defendant and asked him if these rumors were in fact true adding that he, Mr. Sarivola, might be in a position to help protect the defendant from physical recriminations in prison, but that the defendant must tell him the truth. Thereupon the defendant told Mr. Sarivola that he, in fact, had killed his step-daughter in Arizona, and gave him substantial details about how he killed the child. At no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's "protection".

The defense attorney in this case is characterizing the discussions between Mr. Sarivola and the defendant, Oreste Fulminante, as "interrogations" and several times refers to the fact that Sarivola "questioned" the defendant and "got" the defendant to admit to the crimes. It is the State's position that that characterization is inaccurate. Mr. Sarivola spoke to the defendant in conversational tones about what he had or had not done to his step-daughter.

The defendant was not incarcerated for the crime of killing his step-daughter. The defendant was not under arrest and was not a suspect as far as Mr. Sarivola and the F.B.I. were concerned. The F.B.I. and Mr. Sarivola had no supporting corroborative facts concerning the commission of any crimes in Arizona. They did not at that point even know that a homicide had taken place in Arizona. Their inquiries were more to satisfy their curiosity and had definitely not risen to the dignity of a criminal investigation. The F.B.I. had no jurisdiction to prosecute any such crime if in fact there was one. Certainly they had no probable cause to seek the arrest of the defendant for this crime. This was not a forced investigation and was certainly not a police interrogation in any sense. The witness Sarivola could not be characterized as an "agent" for the Mesa Police Department as before any such agency can exist it is fundamental law that the principal must know of the existence of its agent and somehow clothe it with authority of some kind. The Mesa Police Department did not know of Mr. Sarivola's existence, nor he theirs.

There was no reward promised or forthcoming to the witness Sarivola for his actions in regard to Oreste Fulminante. The F.B.I. was paying Mr. Sarivola for information

that he gathered for them which they could corroborate and which they could prosecute or do something about. Obviously they could not prosecute or corroborate any of the facts as concerned in an Arizona homicide. The Mesa Police Department had at that time promised the defendant nothing as far as reward or monies of any kind. Since that time, due to the expense involved in interviews in various parts of the country, and because the witness is in the Federal Witness Protection Program and is in a secret location, the Mesa Police Department has given the defendant approximately six hundred dollars (\$600.00) for necessary incurred expenses in connection with the four separate interviews in various parts of the country. The defendant was in no way forced or coerced, nor were his constitutional rights overridden or were any of his statements involuntary, because he did not have to talk to the witness, Anthony Sarivola, at any time. He was not under Mr. Sarivola's custody or control and could have walked away from him at any time while they were incarcerated at Raybrook Prison.

The defendant has cited several cases including the famous *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602. In the *Miranda* case the Court states that the so called "Miranda Warnings" are required prior to "custodial interrogation of a suspect:"

By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

In this case the questioning was not initiated by a law enforcement officer. The defendant had not been taken

into custody or otherwise deprived of his freedom of action because of anything to do with this case. He was not held incommunicado. Therefore, 'Miranda' does not apply.

The defendant also feels that the testimony of Donna Sarivola, who heard a subsequent confession by the defendant, should be suppressed. First of all, he argues, because of the "fruit of the poisonous tree doctrine," which in the State's opinion is absolutely not involved in this case. There is no "poisonous tree" and there is no "fruit." In other words, there is no illegal search or arrest or illegal confession and there is absolutely no logical connection between that confession and a later confession by the defendant to Donna Sarivola, the wife of Anthony Sarivola.

Donna Sarivola was not an agent of the government at any time, nor did she even know that her husband was an informant for the government at the time that Mr. Fulminante confessed to her. The defendant was not "interrogated" by Donna Sarivola at any time. He spoke freely and voluntarily about his involvement with the crime in Arizona. She simply asked him if he had family and why did he not go to his family upon his being released from prison. The defendant freely chose to confess his full involvement at that time. The presence of Anthony Sarivola at that time is totally innocuous. Mr. Sarivola has said at various interviews that he was paying little or no attention to the conversation that his wife was having with the defendant, Fulminante. There was certainly no threat from Mr. Sarivola, expressed or implied. There was certainly no reason for Mr. Fulminante to be relying on any promises that Mr. Sarivola may

have made to defendant Fulminante regarding protection from physical recrimination by fellow prison inmates. This confession did not occur in prison. For the defendant attorney to say at the bottom of page 5 that the defendant Fulminante "obviously relied on those promises and continued to rely on those promises when he made his second statement to Donna Sarivola" is ludicrous.

The defendant has absolutely failed to show any physical or psychological coercion or anything that would go to the voluntariness of the defendant's statements.

The defendant has cited several cases and I wish to respond to some of them starting with the case of *State v. Montes*, 136 Ariz. 491, 667 P.2d 191. The defendant has cited this case as apparently supporting his proposition concerning the inadmissibility of certain statements. In the *Montes* case the statement was held to be admissible.

The defendant has quoted at length on page 4 of his motion from *State v. Smith*, 107 Ariz. 100 at page 103; 482 P.2d 863. It should be pointed out to the Court that this case involves what is known as the "Messiah" situation. *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 2d 246 (1964); and *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed. 2d 115 (1980). In the *Messiah* and *Henry* cases the Court is extremely clear that the right to counsel arguments under the Sixth Amendment to the United States Constitution are triggered by the Indictment of the defendant for the charge at issue.

In other words, had Oreste Fulminante been indicted for the murder of his step-daughter and been incarcerated his rights to counsel would have attached under

Massiah and *Henry* and therefore no in custody interrogations by agents or fellow inmates or police officers would have been allowed without him having the right to have his counsel present or his counsel's advice. While making this perfectly clear in *Massiah* and *Henry* the Court went on to state in *United States v. Ammar*, 714 Fed.2d 238 (3rd Cir. 1983);

"It is clear from the Supreme Court's statements that the Sixth Amendment right to counsel as enunciated in *Messiah* and *Henry* does not extend to the pre-indictment period" at page 261.

In our own state, *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981), the defendant was in custody and indicted for murder. While he was in jail the defendant confessed the murder to a cell mate and also asked the cell mate to help him murder witnesses against him. Upon release the former cell mate called the defendant while he was still in jail and had the conversation recorded. The Arizona Supreme Court found that *Messiah* and *Henry* were not controlling because the defendant had not been indicted for the new crime of conspiracy to commit murder. Thus the taped conversation was admissible at trial. However, the Court did note that the taped conversation could not be used to prove guilt on the original charge of murder for which the defendant was indicted and incarcerated.

Defendant also cites *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407. This case involved an illegal arrest and subsequent statements made by the defendant which obviously should be suppressed as "fruits of the poisonous tree" but there is nothing to indicate that statements made to Donna Sarivola subsequent to statements made to Anthony Sarivola is in any sense a "fruit of the

poisonous tree". It is not and *Wong Sun* can be excluded from consideration in this case.

In *State v. Hensley*, 137 Ariz. 80, 669 P.2d 58, the Court held that even though a defendant's confession might be obtained in violation of the *Miranda* decision, the confessions could still be voluntary. Even if they were erroneously admitted it did not necessarily mandate a reversal if there was overwhelming evidence of guilt from other sources. The decision in this case is not particularly helpful to any determination of any of the issues in the case at bar.

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, the defendant was stopped for a traffic violation and certain evidence was uncovered. The police authority argued that the defendant had freely given a consent to search. The defendant arguing that he did not know that he could refuse to consent to a consent search. Again, the case simply has no bearing on the issues presently before the Court.

State v. Schad, 129 Ariz. 557, 663 P.2d 366, is another case cited by the defense attorney. The Court held there was no agency relationship between the informant and the police because the informant initially contacted the police and was not promised gain or early release from prison. More importantly, there was no concerted action on the part of the police which was aimed at priming the informant to be a witness against the defendant at trial.

The defendant has cited *State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023, but it is a little difficult to determine from reading *Gretzler* how it supports the defendant's position.

There is a discussion in *Gretzler* that concerns voluntariness of confessions and the Court says it will consider the three following factors to determine voluntariness: (1) impermissible conduct by police; (2) coercive pressures; (3) confession derived from prior involuntary statement. It is submitted by the State that none of these issues have been raised in this case to the extent that they need to be responded to.

The State wishes to bring to the Court's and counsel's attention the case of *Hoffa v. U.S.*, 385 U.S. 293. this case involved the notorious Jimmy Hoppa and his famous conviction for jury tampering. All the time Hoffa was scheming to bribe jurors he had, unbeknownst to him, a paid informer in his ranks. The Court said,

" . . . we proceed upon the premise that Partin was a government informer from the . . . and that the government compensated him for his services as such."

The informant in Hoffa did not use force or stealth and was not a surreptitious evesdropper. He was with Hoffa by invitation and

" . . . every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin (read Sarivola) would not reveal his wrongdoing."

"Neither this Court nor any member of it had ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. Indeed, the Court unanimously rejected that

very contention less than four years ago in *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed. 2d 462."

A dissenter in *Lopez* (supra) said:

"The risk of being overheard by an evesdropper or betrayed by an informer or deceived as to the identity or one with whom one deal is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak."

The Court has consistently held that

" . . . a necessary element of compulsory self-incrimination is some kind of compulsion," *Hoffa* supra and *U.S. v. Reynolds*, 762 F.2d 489 (1985).

Lastly, in *Reynolds* but regarding "custody" approval from *Windsor v. U.S.*, 389 F.2d 530 (5th Cir. 1968) as follows:

"The prime inquiry is into the existance of probable cause. . . . The existence of probaable cause establishes "custody." Any other rule would permit the frustration of Miranda's commands."

In the case at bar the defendant was not in "custody" as meant by Miranda.

Therefore, the State having responded to the defendant's Motion for Suppression of Admissions and/or Confessions, respectfully requests that the Court deny same.

Respectfully submitted this 30th day of October, 1985.

THOMAS E. COLLINS
MARICOPA COUNTY
ATTORNEY

BY/s/ K.C. Scull
K.C. Scull
Deputy County Attorney

Copy of the foregoing
mailed/delivered this
30 day of October,
1985, to:

The Honorable Stephen Gerst
Judge of the Superior Court

Francis Koopman, Esquire
Attorney at Law
1444 N. 16th Street
Phoenix, Arizona 85006

BY K.C. Scull
K.C. Scull
Deputy County Attorney

FRANCIS P. KOOPMAN
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Attorney for Defendant

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,	:	NO. CR-142821
Plaintiff,	:	REPLY TO
-v-	:	RESPONSE ON
ORESTE FULMINANTE,	:	MOTION TO
Defendant.	:	SUPPRESS
	:	(Assgd. to
	:	Hon. S. Gerst)

SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES
FACTS

Mr. Scull goes to great length to attack my analysis of the facts leading up to the original admissions of Fulminante to Sarivola. To support my statement of facts, I hereby submit portions of interviews taken by me on October 21, 1985, of Agent Ticano and Anthony Sarivola at which Mr. Scull was present.

A pertinent portion of Walter Ticano's Interview is attached hereto as Exhibit "A".

A pertinent portion of Anthony Sarivola's Interview is attached hereto as Exhibit "B".

LAW

The rule of *Miranda v. Arizona*, 384 U.S. 456, 16 L Ed 2d 694, 86 S Ct. 1602, 10 ALR3d 974, that a person taken into custody or otherwise deprived of his freedom by the authorities in any significant way must, before being subjected to questioning, be given warnings about his right to be silent and his right to have a lawyer, applies not only to questioning one who is in custody in connection with the very case under investigation, but also to questioning a person who is in jail for an offense entirely separate from the one under investigation. *Mathis v. United States*, 391 U.S. 1, 20 L Ed 2d 381, 88 S Ct. 1503.

Therefor, based upon all the facts presented Fulminante was entitled to his Miranda warnings at the time of his first alleged confession to Sarivola.

The State further seems to allege that Sarivola did not actually question Fulminante but had a "conversation" with him. Apparently the counsel for the State is not familiar with the standard set first in *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L Ed 2d 424 (1972) which states that any conduct deliberately and designedly pursued to elicit information is viewed the same as if it were a formal interrogation.

Mr. Scull appears to argue that even if this conduct was improper and unconstitutional, it should not be held against Maricopa County or the City of Mesa in their attempt to introduce this evidence against Fulminante since they were not a party to the interrogation nor did they know such activity was taking place. The U. S. Supreme Court threw out that argument in 1961 in the

landmark case of *Mapp v. Ohio*, 367 U.S. 643, 81 S Ct. 1684, 6 L Ed 1081 when it stated:

"Federal-State cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches."

Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted. *Byars v. United States*, 273 U.S. 28; *Lustig v. United States*, 338 U.S. 74.

The Defendant stands on all his prior arguments and submits that Mr. Scull's attempt to infuse Massiah, Henry and Hoffa arguments into this case is done solely to confuse and cloud the issues and these cases have nothing to do with the facts or argument in this case.

RESPECTFULLY SUBMITTED this 5 day of November, 1985.

/s/ Francis P. Koopman
Francis P. Koopman
1444 North 16th Street
Phoenix, Arizona, 85006
602-256-0757
Attorney for Defendant

Original of the foregoing
filed this 5 day of
November, 1985, with:

Clerk of the Superior Court
201 West Jefferson
Phoenix, Arizona, 85003

Copy of the foregoing ~~mailed~~/
hand-delivered this 5 day
of November, 1985, to:

The Honorable Stephen Gerst
Judge of the Superior Court

K. C. Scull
Deputy County Attorney

/s/ Francis P. Koopman
FRANCIS P. KOOPMAN

EXHIBIT A

FBI and could be lying through her teeth and I'm not going to know it because you folks won't tell me, I you know.

WT: That's our policy and all I can say is that question is best directed to her and if you feel there are grounds to be persued you'll have to persue them with her. I can only pass on at this time the policy of the FBI.

FK: Okay.

WT: Do you see any (inaudible).

LW: No, that's fine.

KCS: Well I think it's akin to asking her if she's part of the Federal Witness Protection Program and you can't ask that question cause they aren't gonna tell you the answer.

FK: Well I won't go into that with you cause I don't really care about that. Okay, how about when you received the original information concerning Fulminante's alleged admission to Saravola on or about October the 20th of 1983, correct?

WT: Correct.

FK: What did you do with that information insofar as the Mesa Police Department and Maricopa County Attorney's Office is concerned?

WT: Okay, first of all it was prior to October 20th in a telephone conversation with Tony in which he indicated that there's a guy up here that's killed this kid and I said to him I don't know anything about it find out what it's about.

FK: Okay.

WT: Now, I think it was October 20th is the day that I actually went to Raybrook on an unrelated matter and sat down with Tony and had a discussion. At that time he gave me a little bit more about it and I said look I gotta know the whole story get me the whole story.

FK: Okay.

WT: Ask him what it's all about and then I get that information by telephone that night. Those documents may be a little bit misleading about the dates because I was traveling up there, I was actually there and then there was a subsequent phone call in addition to that so.

FK: Okay.

WT: The dates are off by maybe a day, I'm not even sure. That's a hazy thing but I don't recall the exact date because the

* * *

EXHIBIT B

PORTION OF TAPED INTERVIEW

STATE -v- ORESTE FULMINANTE

PERSON INTERVIEWED: ANTHONY SARIVOLA

FPK: Francis P. Koopman

AS: Anthony Sarivola

FPK: Prior to doing that or on the date that you talked to Walt, did Walt ask you to see how much information you could get out of Fulminante concerning that homicide?

AS: No he didn't pressure me at all.

FPK: He didn't ask you - he wasn't concerned about Fulminante at all?

AS: How could he be concerned if he didn't know what it was?

FPK: Lets back up a little bit - you just get through telling him that Oreste Fulminante

AS: I did not say that he killed his daughter, I says - I think from what he says that he might have done it.

FPK: Okay.

AS: Now, thinking is conjecture

FPK: Okay.

AS: Admitting is doing it.

FPK: Okay.

AS: Okay? The man has always been very precise that I work with – Mr. Ticano.

FPK: Mr. Ticano, Okay.

AS: If he's going to lean on somebody, if he's gonna do something, he wants to know what he's doing.

FPK: Correct.

AS: He's not an asshole and he does not walk around acting like one.

FPK: Okay.

AS: He's very professional – Okay? When he has to do something he wants to know who, what, when, why, how and what time the guy went to the bathroom.

FPK: Right.

AS: And that's when he'll do something about it – it lasted that long – there was no rush – be sure before you move.

FPK: Okay.

AS: Okay? He drove it into me and I was always sure before I made any move.

FPK: Okay.

AS: Because regardless of what you believe – all snitches – “your quote” – okay – are not assholes.

FPK: Okay – well I haven't called you an asshole Tony. Now lets go back to your conversation with Walt Ticano on October 20th when you told him about Vince DeMarco and Oreste Fulminante and you indicated to him that you think that Oreste might have killed his step-daughter out in Arizona.

AS: Correct.

FPK: Walt being the precise, hard working, professional F.B.I. Agent that he is, says to you – before I start writing up any reports, or words to that, before I start writing up any reports or asking or telling people to investigate this further – you're gonna have to get me more information from Fulminante.

AS: He was always that way.

FPK: Okay – (Another voice) What exactly did Walt say to you?

AS: Anytime I ever brought him anything, okay, and I don't remember his exact words that day – cause when they did get me, if you remember correctly, I was in the dentist's chair and I had a tooth half hanging out of my mouth and they dragged me out of the dentist's chair to bring me upstairs.

FPK: Okay.

AS: Okay? He said his usual manner “get me what you can or something I can sink my teeth into.”

FPK: Alright.

AS: Okay? It had to be that way or he didn't look at it.

FPK: Alright. Now, several days later . . .

AS: Several days later, okay . . .

FPK: You now have a conversation with Fulminante . . .

AS: Okay . . .

FPK: Out in the yard, I believe?

AS: On the walking track.

FPK: Alright. And, what exactly . . .

AS: We walked every night after dinner . . .

FPK: Alright. And, would it be fair to say that on this particular night your time was running short?

AS: No, his time was running short.

FPK: Well you got out before him, didn't you?

AS: That doesn't mean his time wasn't running short - his time to keep walking around was running short.

FPK: I'm talking about getting out . . .

AS: No, he would have got out - but it wouldn't have been the way I got out - he would have went out of the prison horizontally.

FPK: Why is that?

AS: Because most organized crime figures and most criminals who have some sort of scruples, regardless of what most people believe; and children is a

very soft point except for animals and ah the more the story began to be talked about and get around the joint a lot of people were thinking of hurting the little gentleman.

FPK: Okay.

AS: And he sort of needed somebody to back him up and help him -----(can't make out) ----- people were starting to avoid him and treat him like shit.

FPK: Okay - so at this point - this is the point in time when you take him out or you meet him on the walking track or you go out on the walking and have a conversation with him . . .

AS: That's correct.

FPK: And, you began to question him about his involvement?

AS: No, I didn't begin to question him about his involvement, what I told him, "if you want my help you're gonna have to be straight, if you're not straight then fuck you."

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
)	
Plaintiff,	)	No. CR-142821
)	
vs.)	
)	
ORESTE C. FULMINANTE,)	
)	
Defendant.)	
_____)	

Phoenix, Arizona
November 7, 1985
2:35 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A.
GERST, JUDGE

PRETRIAL CONFERENCE

* * *

(p. 21) THE COURT:

* * *

(p. 22) All right. I have received a motion to suppress admissions and/or confessions, response to motion to suppress, and reply to motion to motion to suppress.

Do I have the date on the memorandum?

MR. KOOPMAN: Yes, Your Honor.

THE COURT: All right. You may proceed.

MR. KOOPMAN: Thank you, Your Honor. Your Honor, before I start, let me state for the record that although, for purposes of argument, we are adopting the facts as stated by the State in their response, because they

do not differ in any manner from the statement of facts, which I put in my original motion, except perhaps the terminology, the use of the word interrogation instead of conversation; and word of custodial interrogation, instead of talking to someone while they were in jail, I think we are down to semantics, and there is really no - no difference between my interpretation of the facts and Mr. Scull's interpretation of the facts.

However, Your Honor, I would also like it noted that in no way are we admitting that those are true facts. They are admitted solely for the purpose of legal argument and not that we are admitting that any confession was ever made to Sarivola or to his wife, Donna, (p. 23) and that issue, if Your Honor does not support my motion, will be taken up at trial, of course, when we get to the credibility of witnesses.

* * *

(p. 26) On the date October the 20th, 1983, when Mr. Fulminante allegedly confessed in the courtyard of Raybrook Federal Detention Prison in New York State, he was in custody. He was in jail.

* * *

(p. 27) The next question is, was he interrogated? All right. The State admits Sarivola was a paid confidential informant of the FBI working for the FBI at Raybrook Prison at that time.

They also admit in their statement of facts that prior to October the 20th, Sarivola had called Agent Ticano and told him that, "There is a fellow up here that, rumor has it, that he killed some girl in Arizona."

The FBI agent told him, "Well, I can't go on rumors. I can't do anything with that information," or words to that effect, "Get me some more solid information from this guy."

Sarivola, on October the 20th, has another conversation in the daytime with Agent Ticano.

Ticano once again tells him, "You've got to get me better information on Fulminante. I can't use simple rumors or guessing."

Sarivola then tells us in his interview that he took a walk with Oreste around the perimeter of the interior of the prison, and during a walk, he tells to him, Oreste, and again, I'm trying to remember the exact wording, and if it's not exactly the wording, it is not (p. 28) done purposely; "Oreste, I'm tired of listening to your bullshit about how that girl died. I want to know the truth. If you want my protection, you better tell me the truth," and, Your Honor, this is his words, "Or get fucked."

That's what Sarivola told Fulminante, and it's on tape and it's part of the documents in this case.

Fulminante then allegedly tells or makes a confession or admission, whatever you want to call it, Judge, whether it's an admission or confession doesn't really matter I think for our argument, Fulminante then allegedly tells Sarivola this story that he - I think the terminology he used was, "Whacked a girl" or, "Whacked his daughter in Arizona."

When asked what the terminology "whacked" means, Sarivola answered, "Killed."

The question now is, was that interrogation, Your Honor, by a law enforcement agency, and I submit to you that there is no doubt - I don't care what case we look at. Let's look at Brewer vs. Williams, a landmark case, which was right on point where they state that any conduct designed to elicit a confession or an admission is interrogation; any conduct, Your Honor, and you know what, in Mr. Scull's argument where he relates to Messiah and Henry, if I can refresh Your Honor's recollection about (p. 29) Messiah, that was where the FBI had an informant, a paid informant got in a car that was bugged with Messiah out of custody and elicited from Messiah admissions concerning his involvement in a particular crime for which he was already under indictment.

Now, Your Honor, again I am not talking about the Sixth Amendment. What I'm talking about is the Fifth Amendment.

At this point, when they talk about post-indictment, they were referring to the Sixth Amendment, but they went on further to say under Messiah, is that interrogation, so that we can now look at the Sixth Amendment, and they said, "Yes, because even though the informant did not specifically ask Messiah pertinent questions about the robbery and simply try to elicit from him some responses, the fact of the matter is, the whole conduct of that conversation was guided toward getting Messiah to make admissions; therefore, it's an interrogation."

The same thing is stated in the Henry case, which the State has alluded to, and in that particular case, that was where the FBI even put in an affidavit with the Court saying that when they sent Nickleson in to question

Henry in jail, they told Henry - I'm sorry; they told Nickleson, "Do not question him. Let him do the talking."

(p. 30) The Court in that case said, "Hey, the man was in custody. The man was under pressure. He had no one else to talk to."

Nickleson went through specifically to see if he could get Henry to talk to him.

Henry did talk to him. We find that to be police interrogation, because Nickleson was a paid police agent, he said specifically to Henry to get the information, and therefore, it's an interrogation for legal purposes.

Your Honor, now, it may have just been in conversation as Mr. Scull says concerning my client's conversation with Sarivola, but legally, under Miranda, it's an interrogation.

So now we have reached two thresholds. We have reached the threshold of custody, and we have reached the threshold of interrogation, custodial interrogation.

Miranda must be given; otherwise, the confession must be suppressed and, Your Honor, that is what you must do in this case.

That was an illegal confession. Now, we have got to look to see whether it was voluntary or involuntary, and if it was involuntary, then it might also be untruthworthy.

All of these - By the way, all of these (p. 31) are found in Miranda, Your Honor, all of these definitions.

Case law, or our own cases state that you cannot use threats of force or violence or promises in order to elicit a

confession, and if you do, such a confession is untrustworthy, because people are liable to say anything.

"Hey, Fulminante. Tell me the truth, and I will let you go free." Fulminante will tell me anything.

THE COURT: You're not arguing Miranda now, you're just arguing voluntariness and -

MR. KOOPMAN: In terms of trustworthiness and the reason I'm saying that, Your Honor, is because we are now going to get to a second confession, and that's an important part of this conversation.

Sarivola is going around the prison allegedly telling everybody that he is a highly placed person in the Columbo crime family, and he is also associated in some way with the Gambino crime family.

He alleges in documents that have been sent to me by the FBI, which he reported to the FBI on October the 20th, 1983, prior to making his report about Fulminante, that he was the member of a five-person crime commission at Raybrook, and that he was so powerful and this commission was so powerful, that they were able to give permission for hits outside the prison.

(p. 32) This is the man that now comes to Mr. Fulminante and says, "Red, if you want my protection, if you want the protection of the Columbo crime family, if you don't want me to walk away from you and let these other guys take care of you for being a child killer, you better tell me the truth about how you killed that girl."

Now, he doesn't say, "How you killed that girl," but that's what he wants to hear.

And he says, "If you don't tell me the truth about how you did it to that girl, I'm not going to help you."

Now, Judge, you can look at it as a threat, "Don't help me, you lose the blessing of the Columbo crime family," or you can look at it as a promise, "Tell me you killed the girl, and I will give you the protection of the Columbo crime family."

I don't care which way you look at it. Either way, there was either a threat or a promise in order to elicit that alleged confession on that particular night during that custodial interrogation.

The reason I bring that up, Judge, is almost - that was October 20th of 1983.

Sometime in May of 1984, Donna Sarivola alleges that Mr. Fulminante had just been released from (p. 33) prison that day and Tony Sarivola happened to be out of prison for some time, had driven to the bus station to pick Fulminante up.

He now drives Fulminante over to Brooklyn and they pick up Donna, and they are now heading for the Pennsylvania area where they are going to drop him off at another former prisoner's house who had gotten - who got Mr. Fulminante some work in a liquor store.

During the ride from Brooklyn, New York, to Pennsylvania, according to Donna Sarivola, she has a conversation while Anthony Sarivola is driving the vehicle.

Mrs. Sarivola has a conversation with this man who had just gotten out of prison, jail that day, whom he has never met before in his whole life, but she's the wife of

the man who has promised protection of the Columbo crime family.

And she says, "Hey, what are you going down to Pennsylvania for? Don't you have any family?"

And at that point in time, Mr. Fulminante is alleged to have said, "Well, I can't go back, because I murdered a girl in Arizona," and then went into great detail with this stranger about how he had committed this crime, which according to Anthony Sarivola was a basic representation of what Fulminante had told him that night in the courtyard in Raybrook.

(p. 34) And I say to you at that point, Your Honor, you then have to look at Wong Sun vs. The United States, because the original confession or admission taken illegally, involuntarily, and untrustworthy at Raybrook was the truth. That confession was the truth of that illegality, that violation of Miranda.

It is now repeated in front of the person who originally received it. For what purpose, Your Honor, because it was untrustworthy?

What is he supposed to do at this point in time, lie to the woman or change his story?

Lie, according to whatever Sarivola would believe. Change his story? No, he's riding with this big shot from organized crime.

THE COURT: Would he not say anything?

MR. KOOPMAN: Well, that's easier said than done, Your Honor.

Again, we are going by what – I'm going by what the Sarivolas are saying and not what my client might say on the stand.

In other words, Your Honor, I will put it out in the open. My client says he has never spoken about Arizona to Mrs. Sarivola under any circumstances, and the only conversation he had with Anthony Sarivola was to tell him how he was under investigation out here, which anybody (p. 35) reading the Mesa Tribune can find out, but be that as it may, sir, my argument is, we now have the fruit of the poisonous tree, him coming forward, making a statement again in front of the person who had originally brought out this illegal, or improper, involuntary, untrustworthy statement.

We then go on to the last argument of the State in their response to my motion, and that is, they say, "Well, Judge, let's say Koopman is right. Let's say Miranda was violated. Let's say Wong Sun might have been violated. What difference does it make? The Mesa Police Department doesn't have anything to do with it.

The Maricopa County Attorney's Office doesn't have anything to do with it; therefore, we should be allowed to use it.

It isn't our fault the FBI screwed up," and apparently, again, the county attorney has not read the case law from the United States' supreme court, which goes back to the 1961 case of Mapp vs. Ohio, and goes on to Byars and Lustig where they say, "Hey, wait a minute. The silver platter rule is no longer in effect. You can't go out and violate as a state or a city law enforcement agency, violate somebody's rights and then turn that information over to

the FBI so that they can use it in federal court, nor can the Federal Government do that, either," because – and actually, it was in these (p. 36) particular cases it had to do with the federal agents violating people's rights, turning them over to state agencies, and that's what he wants to do now.

He's saying, "Forget about the Weeks case. Forget about Miranda. Forget about Mapp vs. Ohio. Forget about Byars and Lustig. Change the United States. Give the Mesa Police Department the right to use an illegally seized confession or admission that they could never use in federal court, but let us use it in state court."

And, Your Honor, that is just not the law of this land. And for that reason, based upon that argument, I respectfully request that not only should the first alleged confession and admission be suppressed, but that the second confession and admission made to Donna Sarivola allegedly in this car ride down to Pennsylvania also be suppressed.

Thank you, Your Honor.

* * *

(p. 38) MR. SCULL:

* * *

We have never admitted and never said or implied that if the FBI screwed up, so what. We should be allowed to use this evidence.

Contrary to the defense attorney's statements to you, Judge, I am somewhat familiar with Mapp and some of the other cases that he's cited, and I know that if one

agency violates the law, that the evidence cannot be used in a state court, for instance, if the federal was to violate the law.

* * *

(p. 42) We have agreed on the statement of facts that this man, this confidential informant was being paid by the FBI. Basically, he was being paid to furnish information about the Columbo crime families and others in the New York City area.

When he was sent to prison on other charges, he kept a communication line open with the FBI. In fact, he was investigated or he was telling them about some other stuff that was going on in the prison that's unrelated to our case.

Well, he went to Oreste Fulminante and (p. 43) said to him, "Is this true or is this not true, this rumor about you killing your stepdaughter," and he did say to him, "You're in some danger here, as far as these other inmates are concerned. They might hurt you if they find out that you are in fact a child killer."

This is not anything that's outside the realm of common sense.

Oreste Fulminante, at that point in time, decided to tell Anthony Sarivola that, yes, indeed he did whack his daughter.

Now, whether or not that's reliable or trustworthy is a matter for the jury to determine at a later time, and that would be determined. It will be made obvious, because of the details that Mr. Fulminante told to Mr. Sarivola and will be related in this courtroom, and it will make it clear

that indeed Mr. Fulminante is the only source that Anthony Sarivola had, and he did relate the details sufficient enough to certainly prove that that's where Sarivola got the story.

I don't think there is any question about the voluntariness or the trustworthiness. There was never in any of the transcripts that I recall, and I still - I don't have the transcript, although Mr. Koopman has told me he's going to get it to me probably today or tomorrow, of Anthony Sarivola's statement.

(p. 44) I don't recall any statement in there that the Columbo crime family was being - promised some sort of protection to Mr. Fulminante.

What I remember is that Mr. Sarivola said, "I will protect you in this prison from physical recriminations from other inmates," and I don't know anything about the Columbo crime family being involved in that prison at all.

THE COURT: Was it in the context of, "I will protect you if you will tell me about this incident?"

MR. SCULL: "If you will tell me the truth, did you or did you not kill this girl?" "Whether you did or didn't," was not the crux. The crux was, "Just tell me the truth, and I will protect you then, because some of these inmates here may try to hurt you physically," and it's no doubt at that time Mr. Sarivola was sitting on some sort of commission in the prison, and they had some control over what went on there in the prison.

And that's a rather long story, and I'm not sure I know the full extent of it myself, but he was in a position to probably help provide physical protection.

* * *

(p. 57) THE COURT: One other question on the issue of force or threats, apart from Miranda, is that an (p. 58) objective test or a subjective test?

MR. KOOPMAN: I think the Judge must look at it from the totality of the circumstances, which is why I have put into my reply to the response excerpts from both Ticano's interview and Anthony Sarivola's.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

VIVIAN KRINGLE, Clerk

RC04-31159 NOv. 8, 1985
Div Date

HON. STEPHEN A. GERST L. Eng
Judge or Commissioner Deputy

NO. CR142821

STATE OF ARIZONA
vs

County Attorney

By: K.C. Scull

ORESTE FULMINANTE

Francis P. Koopman

This matter having been under advisement,

IT IS ORDERED denying Defendant's Motion to Suppress Admissions and/or Confessions dated October 25, 1985 with respect to alleged statements made to Anthony Sarivola on October 20, 1983 and allegedly repeated to Donna Sarivola on or about May, 1984.

The Court finds that the alleged statements contained in the State's Response (which was adopted by the Defendant for purposes of this hearing only) do not fall within the Miranda parameters. The Court does not find that at the time the statements were made that the Defendant was in custody or deprived of his freedom in a significant way. Although the Defendant was in a Federal Correctional Institution, there was no "custodial interrogation". In determining whether there was a custodial interrogation, the Court has considered 1) the site of the interrogation, 2) whether the investigation had focused on the

suspect, 3) whether the objective indicia of arrest were present and 4) the length and form of the interrogation.

Although the site of the statements given in this case was at a Federal Correctional Institution, the Court finds that no investigation had yet focused on the Defendant, there was no objective indicia of arrest with respect to this matter, and the length of the conversations was minimal.

The Court has reviewed the case of *Mathis v. United States*, 391 U.S. 1 (1976) and finds nothing inconsistent with this Court's present holding. This Court does not read *Mathis* to hold that every statement made to a paid informant as a result of a question asked while a person is incarcerated is a violation of *Miranda*. The purpose of the *Miranda* protections is to curtail coercive pressure to answer questions which could flow from a custodial interrogation of someone charged with or suspected of a crime. The Court does not find that the statements allegedly made in this case were the result of promises, threats or coercion by the Government or any of its agents.

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,	)	NO. 142821
)	
Plaintiff,	)	MOTION IN
	)	LIMINE
vs.	)	(Assigned to the
	)	Honorable
ORESTE FULMINANTE,	)	Stephen Gerst,
	)	Div. 42)
Defendant.)	

COMES NOW the State of Arizona, by and through undersigned counsel, and respectfully requests that the Court enter its order herein allowing the State to inquire of its witnesses and of the defendant, should he take the stand, and of his other witnesses concerning the fact that the defendant was incarcerated in Raybrook Federal prison in New York State (in addition to the right to impeach the defendant concerning prior convictions, which motion has been filed heretofor), and as further shown and explained in the attached Memorandum of Points and Authorities incorporated herein by this reference.

Respectfully submitted this 25th day of November, 1985.

THOMAS E. COLLINS
MARICOPA COUNTY ATTORNEY
BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

One of the key pieces of evidence in this case against the defendant is the fact that he made a confession of the

crime to Anthony Sarivola while the two of them were incarcerated in Raybrook Prison, a federal prison in up-state New York. Mr. Fulminante was imprisoned for the charge of a Felon Being In Possession Of Firearm or what is sometimes known as a Prohibited Possessor. It is the State's position that the elements surrounding the nature of the confession and the reasons that the confession was given to this particular witness are such an integral part of the entire environment that existed at Raybrook Prison at that time and place that the State should be allowed to introduce evidence as to the prison situation insofar as it relates to Mr. Sarivola and Mr. Fulminante's temporary confinement there.

It is not the State's intention to mention the nature of the charge for which Mr. Fulminante was imprisoned. In fact, there is nothing particularly heinous or prejudicial about that charge or his imprisonment, and if the State is not allowed to bring up the nature of the charge surely the defendant would bring it up.

Beyond the nature of the charge, however, it is significant that Mr. Fulminante was attempting to impress a person whom he believed to be a member of organized crime. Also, Mr. Fulminante expected future employment opportunities with this man. The fact that Fulminante, in a sense, idolized the witness Sarivola, and further that he looked to Sarivola as being in a position to provide Fulminante with some physical protection should other inmates of the prison seek recrimination against Mr. Fulminante for the horrible crime which he committed in Arizona.

All of these facts and circumstances go to support the voluntariness, the truthfulness and develop the seed bed wherein the confession, it is natural to believe, might be made.

Should the State not be allowed to present the evidence in its true light, it would be nearly impossible to give the jury the complete picture of why Fulminante would give this confession to this man. Certainly there were special circumstances involved and casual acquaintanceships on street corners would not ordinarily be expected to give rise to these kind of confidences.

Beyond that, it is important that Mrs. Donna Sarivola also be allowed to fully explain the circumstances under which she heard the subsequent confession from Mr. Fulminante in the automobile ride immediately upon Fulminante's release from prison. The reason, here again, is because Fulminante wanted to impress these people, believing them to be intimately connected with organized crime. This was his goading ambition in life, to become a member of organized crime and to prove that he was a very tough, cold and callous individual and could commit any kind of crime. The facts are it was a natural continuum of the conversation which started upon being asked why he didn't go to family upon being released from prison then the defendant continued to explain to her that he couldn't return to any family due to the fact that he had committed this homicide in Arizona. He then went on to explain to her some of the gory details, undoubtedly to shock Mrs. Sarivola and to convince her that she was dealing with a really tough, hard customer in Oreste Fulminante.

WHEREFORE the State respectfully requests that the Court enter its order herein allowing the State to go into the circumstances wherein Mr. Sarivola and Mr. Fulminante were imprisoned in Raybrook Prison, and the necessarily special environmental circumstances connected with that prison as it relates to the giving of the confession from Mr. Fulminante to Mr. Sarivola. Further, that the State be allowed to have Donna Sarivola explain in full the story as to how she became a party to receiving the subsequent confession from the defendant.

Respectfully submitted this 25th day of November, 1985.

THOMAS E. COLLINS
MARICOPA COUNTY ATTORNEY

BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

Copy of the foregoing
mailed delivered this
25th day of November,
1985, to:

The Honorable Stephen Gerst
Judge of the Superior Court

Mr. Francis P. Koopman
1344 N. 16th Street
Phoenix, Arizona 85006

BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	NO. 142821
)	
Plaintiff,	)	MOTION
	)	IN LIMINE
vs.	)	(Assigned to the
	)	Honorable
ORESTE FULMINANTE,	)	Stephen Gerst,
	)	Div. 42)
Defendant.)	

COMES NOW the State of Arizona, by and through its undersigned deputy and respectfully requests that the Court enter its order herein, ordering the defendant and or his attorneys not to mention in any way a tape recording made by Anthony Sarivola on or about February 3, 1984, on the grounds that same is collateral and has no material relationship to the present trial, and as further shown in the attached Memorandum of Points and Authorities incorporated herein by this reference.

Respectfully submitted this 22 day of November, 1985.

THOMAS E. COLLINS
MARICOPA COUNTY ATTORNEY

BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

On or about February 3, 1985, a witness in the above captioned case Anthony Sarivola, made a fictitious tape for the FBI in New York City. At that time Mr. Sarivola

was a confidential informant working for the FBI on the streets of New York City and in particular working within the frame work of organized crime. Mr. Sarivola felt that he was under a certain amount of pressure to produce on his agreement with the FBI to get information for them concerning loan sharking activities in that area. He decided to make a false tape recording wherein he represented that he was having a conversation with another person presumably a member of organized crime. Wherein, very briefly "juice" was discussed juice being the exorbitant interest recovered on loan sharking activities.

This tape was quickly discovered to be false and Mr. Sarivola admitted that it was false and his excuse for making this tape was that he felt pressured to produce information. Although, this tape did not attempt to in anyway produce any information it was meant to prove to the FBI that he was in fact working on trying to get information and was meant to "buy time".

It is the State's position that the making of this false tape is purely a collateral matter to the ultimate issue in this case. If Mr. Sarivola testifies the State feels the defendant should not be allowed to question Mr. Sarivola in any fashion about the making of this tape.

"The controlling rule is that when . . . the inquiries relate to only collateral matters the latitude of cross examination is for the most part in a trial courts discussion." *State v. Light*, 636 SW.2 157 (1982), *State v. Messley*, 366 SW.2 390, 393, *State v. Winn*, 324 SW.2 637, 642-643.

In *Powell v. State*, 547 SW.2 1, the Court held that you could not impeach on collateral matters stating

. . . "without the restriction on collateral matters a simple trial could be carried on for years".

In an Arizona case entitled *State v. Riley*, 684 P.2 896 Ariz. App. 1984, the Court held that for a defendant to attack the credibility of a witness for a prior bad act the defendant must be able to show that the evidence would tend to show a motive to lie. The defendant in this case has presented no offer of proof indicating that there was any motive for Tony Sarivola to lie and his prior act of preparing the false tape for the FBI was collateral and would have no effect on his testimony concerning Oreste Fulminante. In other words there was no motive connecting the preparation of the false tape to the Fulminante case, making it collateral. There was no gain to Sarivola from the State of Arizona or any law enforcement agency for the making of the false tape.

In *State of Arizona v. Fletcher*, 670 P.2 411, Ariz. App. 1983, the Court held that the defendant in that case could not impeach the confidential informant's credibility during cross examination by using an incident wherein he stole a birth certificate, he possessed a false birth certificate, he had a false passport and he had used heroin. The grounds given by the lower court were that such forays into collateral matters were too cumbersome and while in fact those inquiries may be relevant to test a witness's credibility it would in fact bog down judicial proceedings and therefore objectionable as being collateral.

In *Thompson v. Oklahoma*, 705 P.2d 188, 1985, the Court refused to allow inquiry into a collateral matter on the basis that the line of questioning was not probative of

the informant's truthfulness. They cite with approval *Carpenter v. State*, 530 P.2 1039.

It is the State's position in this case that the making of the false tape on a prior occasion by Anthony Sarivola was not the same as a false swearing under oath or an attempt to blame another for a crime. It was a false tape made for the purpose of getting more time to pursue a lawful end that is the securing of evidence of criminal enterprises and in fact, this was accompanied by Mr. Sarivola. For that reason it is collateral and certainly is not probative of the truthfulness of Mr. Sarivola and cross examination or inquiry into this area should not be allowed.

Respectfully submitted this 22 day of November, 1985.

THOMAS E. COLLINS
MARICOPA COUNTY ATTORNEY

BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

Copy of the foregoing
mailed/delivered this
22 day of November,
1985, to:

The Honorable Stephen Gerst
Judge of the Superior Court

Francis P. Koopman
1344 N. 16th Street
Phoenix, Arizona 85006
Attorney for Defendant

BY /s/ K.C. Scull
K.C. Scull
Deputy County Attorney

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
)	
Plaintiff,)	
vs.	)	CR-142821
ORESTE C. FULMINANTE,)	
)	
Defendant.)	

Phoenix, Arizona
December 3, 1985
2:09 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A.
GERST, JUDGE

Reporter's Transcript of Proceedings
Volume II - Trial

* * *

(p. 3) THE COURT: Good afternoon, ladies and gentlemen. We're going to start the process of jury selection as soon as I call the case.

This is State of Arizona versus Oreste Fulminante, CR-142821 on for trial.

* * *

(p. 32) There will be in this case evidence that Mr. Fulminante has been convicted of other crimes in the past. I'll give you further instructions as to the legal effects of that kind of evidence and how you should consider that evidence.

Would the fact, however, just knowing that Mr. Fulminante has had prior convictions in the past, have any effect on your ability to render a fair and impartial verdict in this matter?

(No verbal response.)

I take it by your silence it would not.

(p. 46) This is the time the Court set for the hearing of various motions. First matter is a Motion for Reconsideration on Motion to Suppress. I have read all of these motions that I'll make reference to. I have read the case which is attached, which is the Kennedy case.

Either of you have anything to add to the Motion for Reconsideration?

MR. KOOPMAN: I have nothing further, Your Honor.

MR. SCULL: No. Nothing further, Judge.

THE COURT: The Motion for Reconsideration is denied.

MR. KOOPMAN: Your Honor, as a point of law - I'm not arguing it, sir. I just, as a point of law, I believe that Your Honor must make a specific (p. 47) finding of voluntariness, pursuant to A.R.S. 13-3988, and I think - I read your minute entry, sir, and I'm not quite sure whether that was adequate enough according to case law.

THE COURT: I believe my ruling essentially was that this was not an interrogation, which comes within the purview of Miranda.

MR. KOOPMAN: That's correct, sir.

THE COURT: Whether or not I have to make a separate determination on noncustodial interrogations, as to whether statements are made voluntarily or involuntarily before a jury considers it, I don't know.

MR. SCULL: Judge, I don't know either, but I think that we could make that finding on the record to satisfy Mr. Koopman. I think that all of the facts and the arguments and the cases are in, and I think you could make the finding that the statements were voluntarily made.

THE COURT: Well, based on the information which was presented to me, which was only in the form of arguments and a stipulated set of facts, I do not find that there was anything other than voluntary statements that were made, and the ultimate question of voluntariness to any law enforcement officer would be a determination for the jury and as part of my standard (p. 48) instructions.

MR. KOOPMAN: Thank you, Your Honor.

THE COURT: Since you've requested a finding by the Court, the finding of the Court will be that any statements that were made to Mr. Sarivola or Donna Sarivola, his wife, were made voluntarily.

MR. KOOPMAN: Your Honor, just so I can make this clear, that's not for my benefit. I'm just trying to keep the record clear.

THE COURT: Yes. I do not know whether that's a required finding under these circumstances, but it's in the record now.

THE COURT: The motion for - all right.

The next matter was a Motion in Limine filed by the State dated November 25, relating to a request that the Court enter an order allowing State to inquire of its witnesses, and that the Defendant, should he take the stand, and of his witnesses, if any, concerning the fact that the Defendant was incarcerated in Raybrook Federal Prison in New York State. Is there any argument on this motion?

MR. SCULL: Judge, I don't think so. Most of that is moot now as I understand it because there has been an admission in the questioning to the jury about the fact that the Defendant was incarcerated, so I would (p. 49) assume then that I would be able to go into this at trial, to a limited extent to at least show the surroundings concerning the confessions.

THE COURT: It's really the opposite of a motion in limine. It's a motion to - anticipating a possible objection, I suppose; is that right?

MR. SCULL: Well, yes. I think, because as the Court is aware, any time you mention that a Defendant has been in prison on other charges, you have got an almost instant mistrial. So to avoid that situation, I want to bring it up ahead of time.

THE COURT: All right. Do you wish to be heard on that, Mr. Koopman?

MR. KOOPMAN: Yes, Your Honor. Your Honor, I have already indicated to Mr. Scull that it would be ludicrous of us not to bring into the fact or bring in or allow in a direct case presented by Mr. Scull, the fact that

my client was incarcerated in Raybrook Prison. Otherwise, there could be no explanation for the conversation between him and Mr. Sarivola and it would certainly hamper my attempts to attack Mr. Sarivola's credibility.

The problem that arises with this, Your Honor, is that I do not want the jury left unknowledgeable as to what that specific charge was and (p. 50) if the fact was he was doing time for illegal possession, as a felon, of a firearm, which was the .357 magnum, I understand, which he owned here in Arizona.

Well, if we tell the jury that he was doing time in Raybrook for possession, as a felon in possession of a firearm, they are going to be trying to guess at what the underlying felony was.

I, therefore, have indicated to Mr. Scull that I'll stipulate and agree that he may bring into evidence the fact that my client was convicted in 1971 of the crime of uttering a check by false endorsement, which in fact he was found guilty of.

I think the only problem, Your Honor, and perhaps we ought to get on to that right now. This might be the appropriate time to do that. The only problem that Mr. Scull and I have is, is Mr. Scull would like to get into evidence, either in his direct examination of witnesses, because of my client's - because I have already admitted that my client has been previously convicted of a felony, a 1964 conviction for what we used to call on the East Coast statutory rape when he was approximately 21 years old, and had sex with a 15 and a half year old girl.

In those days, they used to tell you, you either go into the Army or you do three years, which is (p. 51) exactly what happened in his case. Mr. Scull would like that fact, which is a 21 year old case, put in or for him to be allowed to put that into evidence.

I suggest to you, Your Honor, that this has been Mr. Scull's attempt to lay an undercurrent of sexual misconduct before the jury pertaining to my client. There's no evidence in this case at all of any sexual misconduct by my client and therefore, Your Honor, I would request that the Court order at this point in time that neither on the direct case as put on by Mr. Scull from his witnesses, nor, if my client takes the stand, in his cross-examination of my client as to his prior convictions should that 21 year old conviction be allowed into evidence.

THE COURT: Well, okay. Just for purposes of clarification, his first request was to allow evidence to come in of the fact that your client was imprisoned in New York, what he was imprisoned in New York for, and the underlying felony for which that crime he was in prison for related.

MR. KOOPMAN: And I'm saying as long as it just goes back to the 1971 conviction for the uttering a false check, which was a felony, and not back to the 1964 conviction for carnal abuse of a child.

THE COURT: Which one was it for?

(p. 52) MR. KOOPMAN: Excuse me, sir?

THE COURT: Which one was it for?

MR. KOOPMAN: Well, he had two prior felonies.

THE COURT: I see. So it could have related to either one?

MR. KOOPMAN: Could have related to either one.

THE COURT: Okay.

MR. SCULL: Well, I want to respond to the rest of his argument, but are you just going to handle that motion separately?

THE COURT: Yes. It will be - The Court will allow testimony relating to the circumstances under which - the circumstance that the Defendant was in fact incarcerated in a Federal facility in New York, will allow testimony, as both parties have agreed, that the Defendant was there and what the charges were that he was there on, which involved apparently a firearm possession charge by a convicted felon, and will allow reference to a 1971 conviction for uttering a false check. Is that what is was?

MR. KOOPMAN: That's correct, sir.

* * *

(p. 57) THE COURT: All right. The next matter is a Motion in Limine filed by Mr. Scull dated November 22, (p. 58) requesting the Court to enter an order ordering the Defendant or his attorney not to mention a tape recording made by Anthony Sarivola on or about February 3 in two different places.

In this motion, you give me two different dates. One is 1984 and one is 1985, which is it?

MR. SCULL: 1984, excuse me.

THE COURT: Okay. 1984, on the grounds that that tape recording is collateral and has no material relationship to the present trial.

Do you wish to be heard on this, Mr. Scull?

MR. SCULL: I think I have set forth the facts, Judge. At the time that Mr. Sarivola made the fictitious tape, he was an informant working for the F.B.I. in New York City.

At the particular time that he made it, he felt that he was under some pressure to produce something. So he produced a fictitious tape, which really in essence says nothing, but he did present that to the F.B.I. as being a factual recording of the conversation between he and another person who he played both roles.

There was nothing in the tape to try to put the blame for a crime onto anyone or nothing was done because of that.

(p. 59) The F.B.I. caught it immediately as being an obvious forgery. He was confronted and admitted that it was a forgery. He then proceeded to continue to work for them and do other things.

THE COURT: When was this?

MR. SCULL: In 1984. February, I think.

THE COURT: Anything else?

MR. SCULL: No, that's it.

MR. KOOPMAN: Your Honor, if anything goes to the credibility of Mr. Sarivola as a witness, it's his attempt to defraud the F.B.I. by making the false tape. Now, I have no objection, Your Honor, to not playing the tape in

court or putting the tape itself into evidence because the tape is really inconsequential.

It's Mr. Sarivola playing two parts. But, I do not feel that it is appropriate for the Court to disallow me from going into that tape, into the circumstances under which that tape was made, and the reasons that it was made, because I intend to show that when Mr. Sarivola allegedly heard this confession from Mr. Fulminante and reported it to his contact, Agent Ticano, he was also under pressure at that time to get information for the FBI, and I think to show that he would go so far as to falsify a tape, to make a phony tape where he played both parts of a conversation, and (p. 60) then attempt to con the F.B.I. into believing that this was a true tape, that this was a true conversation involving criminal conduct, shows the type of person he is.

Not only that, Your Honor, Mr. Scull has not told you all of the circumstances involved in that tape. First of all, it was not discovered right away.

Mr. Ticano, when he was given the tape, took it, listened to it several times and said, "There's something wrong here."

He finally went to Sarivola and said, you know, "Tony, there's something about this tape. I don't know what it is, but there's something wrong here."

And Tony said, "No, man, there's nothing wrong with that tape. It's a legitimate tape."

Ticano went back to his office and played it again, and then realized that that tape had not been made in

Hauppauge, Long Island. It had been made in Brooklyn, New York, because of the background sounds.

He then again confronted Sarivola; Sarivola again denied it. They then brought Sarivola down to F.B.I. headquarters and put him on a polygraph and it wasn't until after he failed the polygraph that he said - finally admitted that he had phoned that tape.

That is what the true story is, Your Honor, (p. 61) and I think it's important for that jury to know the type of man that's going to get up there and say that this man confessed to him. And I think that goes right to the heart of his credibility.

* * *

(p. 64) THE COURT: You know, I think from what little I know about this trial, the character of this man for truthfulness or untruthfulness and his credibility is the centerpiece of this case, is it not?

MR. SCULL: It's very important, there's no doubt.

* * *

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

VIVIAN KRINGLE, Clerk

RC04-31159	12-3-85	Hon. Stephen A. Gerst
Div	Date	Judge or Commissioner
L. Eng.	NO. Cr 142821	
Deputy		

State vs Fulminante (Cont'd)

Defendant's Motion for Reconsideration of Motion to Suppress is submitted on the memoranda.

Ordered denying said motion.

The Court finds that the statements made to the Sarivolas were made voluntarily.

State's Motion in Limine requesting that the State be allowed to inquire of the Defendant and other witnesses as to why Defendant was incarcerated in Raybrook Federal Prison in New York is argued to the Court.

The Court will allow testimony relating to the circumstances under which Defendant was in fact incarcerated in a federal facility in New York since both parties stipulate that said testimony may be admitted since the circumstances of Defendant's incarceration and the reasons for Defendant's incarceration are necessary to a full understanding of the admissible evidence.

The Court will allow testimony with reference to the 1971 conviction for uttering a false check by stipulation.

IT IS ORDERED granting the motion in limine with respect to Defendant 1964 conviction for carnal abuse.

The State has moved in limine to prohibit evidence regarding a tape recording made by Anthony Sarivola in 1984 for impeachment purposes.

IT IS ORDERED denying the motion in limine.

* * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
)	
Plaintiff,)	
vs.	)	Case No.
	)	CR-142821
ORESTE C. FULMINANTE,)	
)	
Defendant.)	
_____)	

Phoenix, Arizona
December 4, 1985
1:57 o'clock p.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
VOLUME III - Trial

* * *

(p. 12) THE COURT: All right. Mr. Scull, you may proceed.

MR. SCULL: Ladies and gentlemen, . . . I am K. C. Scull, and I work for the County Attorney's Office. I'm a prosecutor.

* * *

(p. 27) The Police have a real good idea who they think committed this homicide. Mark Jones will testify that at this point in the investigation, he thinks that Oreste Fulminante took his daughter out in the desert and killed her, is what he thinks, but what brings us to Court, what makes this case fileable, and prosecutable

and triable is that later, Mr. Fulminante confesses this crime to Anthony Sarivola and later, to Donna Sarivola, his wife.

Mr. Sarivola will come in and testify and explain to you the circumstances under which he received or heard the confession of Mr. Fulminante's.

(p. 28) This confession was given in a Federal prison. Mr. Sarivola was there on what is called a loan sharking-type conviction.

Mr. Sarivola is not a preacher. He is not the boy next door. He is not an innocent in any sense of the word. He has connections with or had at that time, and previous to that time, he had connections with organized crime families in the New York City area.

At the time that Fulminante gave his confession to Sarivola, Sarivola was working for the Federal Bureau of Investigations.

Obviously, Mr. Fulminante was not aware of that fact, nor was he made aware of that fact until recently.

Mr. Sarivola has been involved in a lot of things for quite some period of time.

He was a Police Officer in Seagate, which is an area, a part of Brooklyn.

At the same time, he was also connected with organized crime, involved in these loan sharking activities.

The State is rarely, if ever, in a position of choosing witnesses to homicides or to any other crimes.

(p. 29) If we were, I supposed we'd pick folks like yourselves and present nice, pristine people and as near normal or as perfect in every way as possible.

We can't do that. You have to take Mr. Sarivola's testimony as it's offered to you. Here is a tough guy from the streets of New York, and he has the New York accent or brogue, and I hope you're not too offended by his accent, but he is a tough guy; I guess a wise guy, but there are some things about that that I think are very interesting, and I just want to key you a little bit to some of his testimony, and maybe you'll look for it, and maybe it will come out this way.

One of the believable things about Tony Sarivola's testimony, I think you'll find, is that this is the kind of guy that Oreste Fulminante would be impressed by; the kind of guy that he would, I guess, sort of worship or idolize or want to emulate.

* * *

(p. 32) THE COURT: All right. Mr. Koopman, you may proceed with opening statement.

MR. KOOPMAN: Thank you, Your Honor.

Your Honor, Mr. Scull, ladies and gentleman of the Jury. My name is Francis Koopman. I'm Lester Fulminante's Court-appointed attorney. I will be defending him in this trial.

* * *

(p. 39) You've heard Mr. Scull say that he is going to present a lot of testimony, a lot of evidence that will make Lester seem to be a bad person.

Well, the Judge told you when he was Voir Diring the Jury, that Lester has some prior felony convictions, and you will learn that during the course of trial that indeed, Lester is a felon. In fact, when he made his alleged, and I say alleged, statement to Anthony Sarivola, the statement was made at Raybrook Prison or Correctional Institution in New York where Mr. Fulminante, along with Tony Sarivola was incarcerated.

He was in jail for the crime of a felon in possession of a firearm.

That firearm being the firearm which Mr. Scull has described for you, the .357 Dan Wesson.

In this country, under the United States' law, if you have a prior felony conviction, in other words, if you have in the past in your life been convicted of a felony and have not had your civil rights (p. 40) restored by the Judge, by a Court, you cannot, under federal law, own a weapon or a firearm.

Mr. Fulminante had a prior felony conviction.

He was a convicted felon when he owned that .357 Magnum here in Arizona in 1982.

He had been convicted in 1971 of issuing bad checks in New Jersey. That means he passed bad checks to store owners or others for money. He pled guilty to that charge, and when he was charged with being a felon in possession of a firearm at the end of '82, the beginning of '83, he pled guilty to that, also.

* * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
)	
Plaintiff,)	
vs.	)	CR-142821
ORESTE C. FULMINANTE,)	
)	
Defendant.)	

Phoenix, Arizona
December 10, 1985
11:07 o'clock a.m.

BEFORE: THE HONORABLE STEPHEN A.
GERST, JUDGE

Reporter's Transcript of Proceedings
Volume V - Trial

* * *

(p. 4) MARK JONES,

called as a witness herein, having been previously duly sworn, was examined and testified as follows:

CROSS-EXAMINATION (Continued)

BY MR. KOOPMAN:

(p. 45) Q. In other words, the information on criminal history, you would get through LEJIS and not through ACIC or NCIC, you just get back warrants, is that correct?

A. That's is the way way - yes, sir.

Q. Okay. In fact, would it be fair to say that by using these sources available to you, you were able to determine, for example, that Mr. Fulminante had a prior conviction for passing bad checks, a felony in 1971 in New Jersey?

A. Yes. You could retrieve information.

Q. And in fact, it was you who passed that information on to ATF, Alcohol, Tobacco and Firearms, when he was arrested by them for the felony, the federal felony, of possession of a firearm by a felon?

A. Myself and fellow detectives.

Q. Yes.

A. Yes.

* * *

(p. 75) REDIRECT EXAMINATION

BY MR. SCULL:

* * *

(p. 82) Q. Anybody back in New Jersey area?

A. Yes, sir. He referred to his ex-wife.

Q. Deborah DeStefano?

A. Yes, sir.

Q. All right. Anybody else?

A. A man that he was in prison with.

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
)	
Plaintiff,)	
vs.	)	CR-142821
ORESTE C. FULMINANTE,)	
)	
Defendant.)	
_____)	

Phoenix, Arizona
December 11, 1985
1:55 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A.
GERST, JUDGE

Reporter's Transcript of Proceedings
Volume VI - Trial

* * *

(p. 5) ANTHONY MICHAEL SARIVOLA,
called as a witness herein, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCULL:

Q. Would you state your name for the record please, sir?

A. Anthony Michael Sarivola.

Q. Mr. Sarivola, I want to first develop a little of your background for us, please. Will you tell us where you were born and raised?

A. Brooklyn, New York.

Q. And what is your educational background, sir?

A. G.E.D., high school diploma.

Q. Were you ever in the service?

A. Yes, I was.

Q. And did you have employment?

A. Yes, I did.

Q. And what kind of employment did you have sir?

A. I worked for the Seagate, New York Harbor Police Department, Wells Fargo Armored Car, various limousine services throughout the years.

(p. 6) Q. And how old are you now, sir?

A. I'm 30 years old.

Q. Regarding your service with the Seagate Police Department, first, inform us what Seagate is?

A. Seagate is a cooperative on the southwestern edge of Brooklyn, New York.

Q. And what kind of duties did you have for them?

A. I worked for the police department and we were authorized peace officers under the Criminal Procedure laws of the State of New York.

Q. And what kind of duties did you perform? Were you a patrol officer?

A. Patrolling and protecting life and property, issuing traffic citations.

Q. All right. How long were you employed with Seagate?

A. Over a span of two years.

Q. How long were you employed in what we might call active everyday service?

A. About five months.

Q. And why do you say two years then?

A. Because I had to come back to testify for cases I had going, and twice I came back to help when they were short.

(p. 7) Q. All right. Did you attend any police academies or anything?

A. Yes, I did.

Q. Or was there any certification to be a police officer?

A. Not at that time, it wasn't required. Then they came out with a peace officer law in the State of New York that everybody who was appointed a peace officer and there was no requirements for, they made you take 280 hours of classroom.

Q. Did you do that?

A. Yes, I did.

Q. Did you did attend an academy?

A. Yes.

Q. What academy?

A. Classes were at the New York City Police Academy on 20th Street and Manhattan.

Q. Did you graduate?

A. Yes, I did.

Q. Now, why did you leave the Seagate Police Department?

A. For financial purposes.

Q. And were you at that time also working with an armored car company?

A. Yes. Scorpion Armored Car.

(p. 8) Q. Excuse me?

A. Scorpion Armored Car Company.

Q. How long were you with them?

A. About eight months.

Q. All right. Is it fair to say that you handled cash for them?

A. Large amounts up to three, four million dollars.

Q. Now, when you say you quit Seagate for financial reasons, what are you talking about, Mr. Sarivola?

A. We were only at that time paid \$160 per week before taxes. A real low paying job, and I just had a new child that was born, and I had purchased a house, and I was working two jobs, and just wasn't making it.

Q. So what did you elect to do?

A. I elected to go with some friends who were - had a lot of financial advantages for me.

Q. What kind of friends were these, Mr. Sarivola? Was it criminal activity, it that what you are talking about?

A. Yes, sir.

Q. What kinds of friends were they?

A. Members of an organized crime family.

Q. And is it true to say then that you worked (p. 9) with them for some time?

A. Yes.

Q. How long approximately did you work with them?

A. Until 1984.

Q. During the time that you were a police officer at Seagate were you connected with these people and working for them and with them?

A. Yes. In a lot of fashions.

Q. All right. About what year was this, Mr. Sarivola, that you would have first made some sort of a full time commitment to your organized crime activities?

A. Late '78, early '79.

Q. Now, then there came a time when you decided to change your career; is that correct?

A. Yes.

Q. And when was that?

A. That was in early 1983.

Q. And what did you do to effect this change?

A. I arranged a meeting with a Special Agent Walter Ticano, an officer of the Federal Bureau of Investigation, and told him that I did not want to participate in the life that I was participating in any more and that I would assist him in making cases against members of organized crime.

(p. 10) Q. And did you proceed to do that then, sir?

A. Yes, I did.

Q. And have you done that until this time?

A. Yes, I have.

Q. And have you made cases for the FBI?

A. Yes, I have.

Q. And does it involve some high ranking members of organized crime?

A. Yes, it does.

Q. Some of those cases are ongoing at this time; is that correct?

A. Almost all of them are.

* * *

Q. Mr. Sarivola, have you spent time in prison?

A. Yes, I did.

Q. And when did you spend time in prison?

A. From some - the end - about the middle of September of 1983, until November 28th, somewhere in that vicinity.

Q. Is that roughly about 60 days?

(p. 11) A. Roughly about 60, 70 days like that.

Q. All right. Where did you spend this time?

A. Raybrook Federal Correctional Institution.

Q. Where is that?

A. Raybrook, New York.

Q. And did you meet one Oreste Fulminante at that institution?

A. Yes, I did.

Q. And is he present in the courtroom today?

A. Yes, he is.

Q. Would you point him out and describe what he's wearing for the record, please?

A. He's sitting right over there. He's wearing a brown shirt with checks, beige pants, beige shoes. He's sitting next to his defense attorney, Mr. Koopman.

MR. SCULL: May the record reflect further identification of the Defendant, please?

THE COURT: Yes, if may so reflect.

Q. BY MR. SCULL: Do you recall when you first met the Defendant?

A. Yes, I do.

Q. Can you tell us when that was?

A. It was approximately about the eighth day I was in prison. I had just been released from administrative detention.

(p. 12) Q. Does that mean that when you come into prison, you are kept somewhat secluded or isolated for a short time?

A. Well, sometimes if they don't have your records, they will keep you there until they get your records.

Q. All right. So you do recall meeting him for the first time?

A. Yes, I do.

Q. Now, at this time, were you working for the FBI?

A. Yes, sir.

Q. Were you undercover, so to speak?

A. I was an informant.

Q. All right. So you were keeping up a masquerade of being an organized crime connected figure?

A. That is correct.

Q. Were you being paid by the FBI at that time?

A. At that time, no.

Q. Okay. Was the fact that you were in prison somehow related to any deal that you made with the FBI?

A. I was in prison because of my conviction on an extortion charge.

Q. What kind of extortion charge? Explain to us why you were convicted.

(p. 13) A. I was convicted of loan sharking. It's called Extortion for Credit Transaction.

Q. All right. Explain to the Jury, and to us, what loan sharking is?

A. Loan sharking is when you lend money to somebody for a higher rate of interest that they would pay at the bank, and should they not pay the loan, you use violence or threats to collect the money.

Q. And that was your main business, was it, before you went to prison?

A. Yes, it was.

Q. Did the FBI or any law enforcement agency forgive any other criminal actions of yours that they were aware of at that time?

A. They had no other at that time.

Q. The FBI, or some federal agency, did commence to pay you some funds at sometime, did they not?

A. Oh, yes, they did. It was for the quality of information provided. The payments would vary according to the quality of the information.

Q. All right. And were they paying you - did they pay you any amount during the time you were in prison, for instance?

A. No.

Q. What kind of acquaintanceship and (p. 14) relationship with the Defendant did you have while you were in prison?

A. We became friends. We used to hang out. We lived in the same unit and worked in the same section.

Q. Well, describe this unit for us. Is it a free flow among prisoners or are you locked up or -

A. No. They only lock you down at night. During the day you have the key to your door so you can shut it so nobody can get in and rob things, so the majority of the time, you have a free flow to walk around and hang out.

Q. Okay. And how often would you see the Defendant while you were in prison?

A. Every day.

Q. And how often in the day would you see him?

A. Usually for an average of maybe some days, you know, seven hours a day; some days, two or three.

Q. Well, how did you pass your time in prison? Did you read or did you watch television, or talk, or what?

A. Read, watch television. Most of the time we used to hang around and talk.

Q. Did a rumor concerning this Defendant come to your attention while you were in prison?

(p. 15) A. Yes.

Q. What was that rumor?

A. The rumor was that he was wanted - not actually wanted on a warrant, but they were investigating him for killing a child in the State of Arizona.

Q. Did you know anything about this killing in Arizona?

A. No, I did not.

Q. Did you ever have access to Arizona papers or Arizona news of any kinds?

A. No, I did not.

Q. Did anybody from Arizona ever come to that prison and interrogate you about anything to do with Arizona?

A. No, they did not.

Q. Had you ever heard of Mesa, Arizona, prior to that time?

A. No, I did not.

Q. All right. Did there come a time, then, when you talked to the Defendant about this rumor of the killing in Arizona?

A. Oh, we talked quite a few times on it.

Q. Well, what did he tell you?

A. Well, in the beginning, he denied that he had anything to do with it and he said first that bikers (p. 16) did it and they were looking for drugs.

And then he said he didn't know what happened.

Q. All right. Did you tell Mr. Walt Ticano of the FBI about this situation with Mr. Fulminante?

A. Yes, I did.

Q. Did he give you any instructions or directions, comments? Tell me what he said.

A. The only thing he said to me was, you know, "Find out more about it. Give me - get me something to look at."

Q. What did you do then?

A. Well, I continuously stayed around. Another gentleman that used to hang out, a fellow by name of Vince DeMarco, me and him and Mr. Fulminante used to hang out together. And quite a few times the conversation came up, and I used to try and try and pick up whatever I could.

Q. All right. Tell me, did he ever tell you anything about it?

A. At that time, no. It went on for a few months, up until almost the time I got out.

Q. All right. Tell me when he told you what he had done?

A. It was, oh, the latter part just before I (p. 17) got out. I'd say a couple of weeks before I got out.

* * *

Q. Tell us what he told you?

A. Well, quite a few nights after dinner, we used to go walking on the - there's a track because it used to be the only big training grounds, so they have a big running track.

And we used to go walking around, and he was getting a - starting to get some tough treatment and whatnot from the guys and I told him, you know, "You have to tell me about it," you know. I mean, in other words, (p. 18) "For me to give you any help." And he told me that he did in fact kill her.

Q. What did he tell you, as closely as possible the words that he used as he described this to you?

A. He told me that - he said that he "clipped her."

Q. "Clipped her"?

A. "Clipped her."

Q. What does the term "Clipped" mean?

A. "Clip" means to kill somebody.

Q. All right. Did he tell you anything else about it?

A. He said that he had took her out to the desert and he shot her twice in the head.

Q. Did he tell you why he did it?

A. He said that she was a little bitch and she was always in his way with his wife. She started a lot of trouble.

Q. Did he describe the surroundings in which he did this to her?

A. He said it was the desert and there was some rocks, you know, and sage brush and stuff like that and all I could know what he was saying is pictures from what I have seen on TV, because before that, I had never seen a desert except for around Las Vegas.

(p. 19) Q. All right. Did he say how he took her to the desert?

A. He said on a motorcycle.

Q. Did he say where his wife was at that time?

A. He said she was not at home. He was supposedly watching her or something like that.

Q. All right. Do you know where the wife was at that time?

A. No, I do not.

Q. Did he tell you that he did anything else to the child?

A. Well, he was talking something about her giving him head.

Q. What do you mean by that; you mean, oral sex?

A. Oral sex.

Q. He made her give him oral sex?

A. Something like that I recall. I do not exactly, you know, remember his exact words. Or -

Q. Do you have any recollections as to how he preformed this or did this?

A. No, I do not.

Q. Did he say that he did anything else to the child besides shooting her and the sexual assault?

A. He said that he choked her and made her beg (p. 20) a little bit.

Q. Did he say how he choked her?

A. No, he didn't.

Q. Did he ever describe a weapon to you?

A. Yes. A .357 magnum Dan Wesson revolver.

Q. Do you remember talking specifically about that kind of revolver?

A. Yes, I do.

Q. Did he tell you anything unique about that kind of revolver?

A. That he had bought another barrel for the weapon.

Q. And did he tell you that he used that in any way or not?

A. He said he did not use the other barrel.

Q. Did he ever tell you what happened to the weapon?

A. He - as far as I can remember, is that he left the weapon out in the desert somewhere.

Q. Now, what kind of reputation, if you know, did Mr. Fulminante have around the prison for being truthful and honest?

A. Well, most people believed him not to be truthful.

Q. Now, what makes you think he was telling you (p. 21) the truth at this time?

A. Because one of the few times he became serious and he was and not trying to put up a front about it.

Q. Did he ever tell you there was a pile of rocks by where he killed her?

A. Yes, he said something about a pile of boulders.

Q. What kind of relationship did he describe to you that he had with this girl?

A. Very lousy relationship. He thought that she was always in the way between him and his wife, and she was a little bitch.

Q. And how did he refer to her in these conversations?

A. Usually a little fucking bitch. Those were usually his words towards her.

Q. Did Mr. Fulminante express any remorse to you about this killing?

A. No, he did not, sir.

Q. Did he ever on any subsequent occasion?

A. No, he did not.

Q. Did you talk about this on any subsequent occasions?

A. Yes, we have touched on it a few times (p. 22) before I actually departed from prison.

Q. Did he ever tell you where the gun was hidden?

A. Somewhere by that pile of rocks.

Q. Did he ever make any statements about the authorities being unable to find it?

A. Yes. He always said that they were too fucking stupid to get him, that they never knew where to look, and – but he did say that they were constantly applying pressure and he was very, very worried it would be waiting for him when he got out of Raybrook.

Q. How did you feel when he told you, when he gave you this confession?

A. Sick. How could you kill a kid?

Q. Now, Mr. Sarivola, you've been involved with organized crime and I imagine you've been involved in some tough incidents in your life, haven't you?

A. Yes, I have.

Q. What about this that makes you particularly sick?

A. How could you do anything to a child? I mean, we used to do things to each other but it was among men.

Q. After you got out of prison, Mr. Sarivola, did you continue to work for the FBI?

(p. 23) A. Yes, I did.

Q. And did you get paid and furnish them with information?

A. Yes, I did.

Q. Did you get paid anything by the FBI for any of the information connected with this case?

A. No, I do not believe so.

Q. Did you receive any benefit from the FBI or any federal agency concerning this case?

A. No, I did not. It was not a federal case. It wasn't under the federal jurisdiction.

Q. Have you ever received any money from the Mesa Police Department or Mark Jones?

A. Yes.

Q. And do you recall how much?

A. Total of six hundred bucks.

Q. Okay. And what was that money for, do you know?

A. Kennel expenses for dogs when I had to make the trips. And other expenses that went above what I was allowed for per diem.

Q. And you have subjected yourself to several interviews in regards to this matter, have you not?

A. Yes, I have.

Q. Do you remember approximately about when the (p. 24) first interview was?

A. It was somewhere in the latter part of September of 1984.

Q. And do you remember Mark Jones and myself and others being present?

A. Yes. There were - you were present, Detective Jones, and there was another fellow from your office. I don't remember his name.

Q. And two Federal agents, Special Agents Ticano and Charles Bernardo of the FBI, Jerry Burnstein from the U.S. - of the Eastern District of New York. And also, Laura Wood from the Eastern District of New York.

Q. All right. And that interview took place where?

A. At the United States' Courthouse up in the U.S. Attorney's office. I think it's the sixth or seventh floor in Brooklyn.

Q. Excuse me, were you finished?

A. Yes.

Q. Do you remember about how long that interview took place?

A. Oh, I'd say somewhere in the vicinity of about an hour and forty minutes.

Q. And during that interview, you told us some (p. 25) of these things that we have talked about, didn't you?

A. Yes, I have.

Q. You didn't tell us all of these things, did you?

A. No, I did not.

Q. Can you tell me why?

A. Number one is, for the two weeks preceding that, I was being interviewed eight hours a day, six days a week, by a multitude of federal agents on different cases.

I had a lot of pressure on me being in fear of my life because they had tried to kill me before I came off the street. And another reason is, I did not know what to expect from you.

Q. Would it be fair to say that you were somewhat abrupt almost to the point of being rude?

A. I would say I was hostile towards you.

Q. It was decided then – excuse me, let me ask that in the form of a question. Did you submit yourself then to follow up interviews with myself and representatives of police agencies?

A. Yes, I did.

Q. All right. And so we met again, didn't we, in another state?

A. Yes. Lexington, Kentucky.

(p. 26) Q. You talked to us at some length many times, did you not?

A. Yes, I did. You and an investigator by the name of Barker.

Q. Dan Barker from my office, correct?

A. Right.

Q. And at that time, you did not mention to us anything about a sexual assault that Mr. Fulminante told you about?

A. No, I did not.

Q. And do you remember why you did not tell us about that at that time?

Because nobody ever asked me about that. They only asked me about the incident itself and I didn't think – I don't know, I just wasn't very sure of it, because like I

said, it's only generality that I remember something about it. I had no details to that particular part of the statement.

Q. Okay. That interview concluded with some other new information, did it not?

A. Yes.

Q. Mr. Sarivola – and would you describe that other information?

A. That my wife Donna was also involved in a conversation with the Defendant when he came out of (p. 27) prison and we picked him up, and took him to Pennsylvania. And during that conversation, Donna and the Defendant had a conversation also about the incident.

Q. All right. And you were present at that time, you were driving the vehicle?

A. Yes, I was.

Q. Okay. Do you have any specific recollection about that conversation?

A. Well, they were having a conversation. I was driving. It was on the New Jersey Turnpike. And the situation came up about Arizona and his daughter and they were talking about it.

And, you know, it was – it was similarly something like the conversation that I had with him in prison, but you know, there was different wording, and I wasn't really paying too much attention, because I'd heard it before and I was driving and they were talking, and she even argued with him a little bit about it and she was disturbed about it.

Q. Okay. Do you remember any of the wording that was used? Do you have any recollection of that yourself?

A. No, I do not, sir.

Q. So it was at the Lexington meeting that we had that Donna's name came up for the first time; is that (p. 28) correct?

A. Yes, sir.

Q. And you volunteered that information?

A. Yes, sir.

Q. And you cleared it with her, I assume?

A. I went to a pay phone and called her, being the fact that I'm in a Federal Witness Protection program and nobody is allowed to know where I live, so I could not call in front of you.

I went there under the escort of Special Agent Charles Bernardo of the FBI. I dialed the number, he listened to the whole conversation. I just asked her if she would be willing to testify and she said yes.

Q. So then another meeting was set up; is that correct?

A. Yes. Sioux Falls, South Dakota.

Q. And why were we meeting in these different places, if you know?

A. Because of my situation in the Witness Protection Program for safety, each time we would meet, it would be in a different city.

Q. Let me come back to the Witness Protection Program in a few minutes, okay?

A. Okay.

Q. We did meet then in Sioux Falls, South (p. 29) Dakota; correct?

A. Yes, we did.

Q. And you were interviewed again, which would be the third time; correct?

A. Yes, sir.

Q. And I was present and Detective Jones was present. Anybody else present?

A. Special Agent Walt Ticano and Special Agent Charles Bernardo with the FBI.

Q. And at that time, you mentioned something about the sexual assault for the first time; is that correct?

A. That is correct, sir.

Q. Now, up until this time, let's find out how long your relationship with Donna existed, okay?

A. Yes, sir.

Q. When did you first meet her, or first begin to know her?

A. Probably in the vicinity of about 12 or 14 years.

Q. All right. You are married to her now?

A. Yes, I am.

Q. When did you first commence to live with her or get married to her or however your relationship began specifically with her?

(p. 30) A. I would say the early part of 1984.

Q. All right. So is it safe to say that it was after you were in prison and you had the conversations with Mr. Fulminante in prison?

A. That is correct.

Q. After you came out of prison, did you tell Donna about your conversations Fulminante in prison?

A. No, I did not. She did not even know I was working for the FBI.

Q. When did she first know that?

A. She knew that about two days after I came off the street.

Q. When did you come off the street?

A. In the beginning of August of 1984.

Q. What do you mean by "coming off the street"?

A. At that point, after they tried to assassinate me, it was the Bureau's determination that I could no longer safely function as an operative on the street and that I would have to enter the Witness Protection Program in order to remain safe.

Q. All right. At this time, did you tell Donna anything about your conversations with Fulminante?

A. No, I did not.

Q. Have you ever told her anything about your conversations with Fulminante?

(p. 31) A. No, I did not.

Q. Has she told you anything about her conversations with Fulminante?

A. Other than what was disgust, no.

Q. Other than what? I'm sorry.

A. Her disgust with the Defendant.

Q. All right. Tell us what that is?

MR. KOOPMAN: Objection, Your Honor, hearsay.

THE COURT: Yes, that was an expression of an emotion. Objection is -

MR. SCULL: I'm sorry. I thought he said discussion. I'm sorry, I'll withdraw that question.

THE WITNESS: Discussions? The only discussions we have ever had about the case in general was generalities about, you know, coming here to testify, and about meetings.

Q. BY MR. SCULL: But did you ever discuss specific wording that the Defendant used or that you used or that she used in the conversations?

A. No, sir.

Q. I think I asked you what the term "street" means when you say coming off the street or going on the street?

A. It means actually, you know, living out in (p. 32) the city, working every day, carrying on your life.

Q. So since August of 1984 – is it 1984 that you've been in the victim witness or the Witness Protection Program?

A. Yes, sir.

Q. And describe that program for us, as it applies to you, Mr. Sarivola?

A. In what sense?

Q. Well, what is the program, first of all?

A. Well, the program is a vehicle to give people that cooperate with the government a new identity, a location to live, and assistance until you're able to take care of yourself financially.

Q. And do they also provide protection for you when you have to come out of your location?

A. Yes, they do.

Q. Like, for instance, coming here today?

A. Coming her today.

Q. And there are U.S. Marshalls in the courtroom today with you, aren't there?

A. Right. Also, with my family, and when I travel.

Q. All right. Mr. Sarivola, did there ever come a time that you doctored up a tape for the FBI?

A. Yes, I did.

(p. 33) Q. And do you recall when that was?

A. It was somewhere in the Spring of '84.

Q. And why did you do that?

A. Well, at the time, when I came out of the prison I had agreed to wire up against people and go into the program, because my relationship with the Bureau in the beginning was only as an informant; just to provide information and direct them towards making cases, not to actually testify.

So when I came out, my agreement had changed and I agreed to wire up and tape conversations and to actually testify in court proceedings. And they wanted me to get this particular person, and they wanted – they were putting a lot of pressure on me because it was not happening fast enough.

I had to get back into the main stream; you know, you have to get back into working slowly to get everybody's confidence back because you've been away from everybody. And Walter said that if I didn't pop this soon, I would have had to come off the street at that time and just do whatever I had already sitting on the shelf to be done.

And I told him if I could not come off, I was not ready to come off. I had to too many things, personal items to take care of. And every day, they just (p. 34) kept calling me about it and haunting me about it so I figured, you know, I'd give them what they want, get them off of my back, and then I'd do it and then I would bring it out and clear it up.

Q. So tell us what it is that you did?

A. I created a conversation on tape between me and the person that was allegedly to be.

Q. I think you referred to him as Mike?

A. Right. And I turned the tape over to Special Agent Ticano and, in fact, it did just what it was supposed to do. They left me alone after that and let me go on to what I had to do, except for the fact is, after that point, I stopped talking to Special Agent Ticano.

Q. All right. Did it later come to the attention of the FBI, Walter Ticano?

A. Well, yes, it did. Special Agent Ticano knew there was something wrong because we had had a very good relationship and all of a sudden I started avoiding him because I really did not like what it did. What I felt it was at the time, it was necessary to do in order to get him off my back.

Q. Did he challenge you about the tape?

A. Not for the first couple of weeks but after I kept staying away from him, yes, he did challenge it.

(p. 35) Q. What happened then? Did you eventually confess that it was a phoney tape?

A. Yes, I did.

Q. I'm going to hand you what has been marked as Exhibit No. 35, and just ask you if you can tell me what that is?

MR. KOOPMAN: Your Honor, may I see Exhibit 35? There was no 35 -

THE COURT: All right. He's just handing you a copy of it.

Q. BY MR. SCULL: Can you tell me what it is?

A. This is a transcript of that doctored tape.

Q. Have you had the opportunity to review that entire transcript now?

A. Yes, I have.

Q. You've seen it before this minute, have you not?

A. Yes, I have.

Q. All right. Is it a fair and accurate transcription of the false tape recording that you made for the FBI?

A. Yes, it is, sir.

Q. Would you read it for us, please?

A. You want the whole entire - from the top, or just from where it starts?

(p. 36) Q. Just read the part that is the false tape recording.

MR. KOOPMAN: Your Honor, I'm going to object. The document stands for itself. If he's going to move it into evidence, the jury will be able to read it. I don't know why we need it read.

THE COURT: Do you have any objection to the Jury knowing what the words are that were used in the tape recording?

MR. KOOPMAN: No, but perhaps since we have the tape recording, we might play it.

THE COURT: My question is, do you have any objection to their knowing what the words are?

MR. KOOPMAN: No.

THE COURT: All right. The witness may read the words to the jury.

THE WITNESS: "My name is Anthony Sarivola. I reside at 714 East 4th Street in Brooklyn. My date of birth is 3-30-55. I am going to attempt to tape a conversation. (Inaudible)"

And then it's inaudible. It's supposed to be with this gentleman Mike about loan sharking.

Q. BY MR. SCULL: Well, just read what the tape says.

A. "6:45 a.m. in the morning. The date is (p. 37) February 3rd, 1984." And it says "inaudible." "With Special Agent Walter Ticano. (Inaudible) I'm gonna to meet Special Agent Walter Ticano so he can take custody of the tape. (Inaudible) the car warmed up so I don't have to have the heater on when we get into the car. I'm getting out of the car now, and gonna go try and bring him into the car.

"Silence 20 minutes.

"So what's up, Mike?

"Huh?

"What's up?

"Here's the 1500, I owe you the juice for three weeks.

"How's your father doing?

"He's doing alright, I believe.

"What's the matter? You in a rush this morning?

"Yeh, I don't want to meet you, we, ah, we're going to be (inaudible).

"I didn't have no time this morning. So what do you wanna do? Do you wanna get together during the week?

"Yeh, I'll meet you Tuesday I think.

"Alright. Take care, buddy.

"OK."

(p. 38) Some conversation, the radio in the car makes it inaudible.

"Alright. I'll call you Tuesday night, alright. OK, buddy, take care. Say hello to your brother John.

"Alright, buddy, I'll call you on Tuesday, alright? (Inaudible) shit why I showed up in his house. Froze his ass up good. Alright."

Then it says Special Agent Walter Ticano, "Alright. This is Special Agent Walter Ticano. It's 11:05 a.m., ah, February 3, 1984. I'll be taking possession of a tape in which Anthony Sarivola (at this point it sounds as though someone switched off recorder for a while). 1500 hours, juice was discussed and, ah, various other subjects.

Q. All right. Except for that last statement, which was allegedly by Walter Ticano, the rest of that were statements that you made on this tape; correct?

A. Yes, sir.

Q. You played both roles here so to speak?

A. Yes, I did, sir.

Q. And you did that to try to get time or whatever you needed?

A. That's correct, sir.

Q. Okay. The one part there if you'll look on (p. 39) the first page of the transcription, about in the center, there is a statement "Here is the 1500, I owe you the juice for three weeks."

Do you know what type of reference you were making when you said that?

A. Well, I was in the shark operation with this gentleman and his cut was 1500 bucks for the three week period.

Q. And what is "juice"?

A. Interest.

Q. Does juice refer to the \$1500 lower to something else?

A. Oh, it's to the principal, in fact.

Q. Do you know if anything ever happened to the other subject that you represented on this tape because of this tape?

A. Nothing at all.

* * *

(p. 40) CROSS-EXAMINATION

BY MR. KOOPMAN:

Q. Mr. Sarivola, you indicated during your direct examination that for a period of time you were a member of the Seagate Harbor Police Department; is that correct, sir?

A. That is correct.

Q. And could you tell us when that was? When did you become associated the first time with Seagate Harbor Police Department?

A. August, 1978.

(p. 41) Q. August of '78.

And when did you leave full employment with the Seagate Harbor Police Department?

A. Around November.

* * *

(p. 42) Q. Okay. Now, you recall Detective Mark Jones over here?

A. Yes, I do, sir.

Q. And do you recall originally being interviewed by him on August 21st, 1984?

A. I thought it was either late August or early September.

Q. Okay.

A. Not to be specific on a date because I really don't remember.

Q. Well, if Officer Jones indicated in his report that it was August 21st, 1984, you have no argument with that, do you?

A. No, sir.

* * *

(p. 45) Q. Okay. And you indicated that you first became involved seriously with the – was it Columbo Crime Family?

A. Columbo Crime Family.

Q. In 1978, '79?

A. Seriously, I would say about around November, '78, just about the time I quit from Seagate.

(p. 46) Q. Just about the time you quit Seagate; is that correct?

A. Yeah.

Q. What is – you were an associate of the Columbo Crime Family?

A. That is correct.

Q. What is an associate of a crime family?

A. Well, when you first become involved in the family, naturally you can't be a big guy because nobody knows you. You've got to earn your way up, so you become an associate.

Q. Why don't you tell us what a "made-guy" is?

A. A "made-guy" is, you have the structure of the crime family; you have the boss. Beyond the boss, consiglieri, which is the counselor. You have captains, and then you have soldiers, or soldier is a made-guy and under him, each soldier varies. Some have 10, some have 20, some have 2 associates that do their bidding for them.

Q. Okay. So you did bidding of some soldier in the Columbo Crime Family then?

A. A Captain.

Q. A captain. Oh, so you worked directly under a captain?

A. That is correct.

(p. 47) Q. Okay. And you worked for him at the time you were performing police functions; is that correct?

A. That is correct.

Q. Okay. Would it be fair then to say that in street terminology that you were kind of a rogue cop?

A. No, sir.

Q. Why not?

A. Because when I was out there, I did my job.

Q. I see. So when you put on the uniform, you enforced the law, but when you got off duty, you were a gangster?

A. That's correct, sir.

Q. And that didn't bother your conscience at all, did it?

A. No, sir.

* * *

(p. 48) Q. All right. You indicated that prior to going to Raybrook Prison you made some sort of a deal with the FBI through Agent Walter Ticano; is that correct?

A. That is correct. After my sentencing.

Q. After your sentencing?

A. That's correct.

Q. But prior to going to Raybrook?

A. Yes, sir.

Q. Okay. And what was that - did somebody try to assassinate you at that time?

A. No, sir.

Q. Well, and when you went to Ticano, did you offer to give him all of this information you had voluntarily without any payment?

A. No, sir.

Q. When you went to Ticano, you offered to sell him information about your other associates; is that correct?

A. I volunteered to give him the information. He said that customarily you do get rewarded for your services but it depends on the information and how it could be verified, and the payments were always given (p. 49) behind time, not when you gave the information, but after they had the time to disseminate it.

* * *

Q. When for the first time have you ever testified before a jury concerning any cases you made for the FBI?

A. Jury or Grand Jury?

Q. A jury, a regular trial jury?

A. Trial jury, none yet, sir. They are not - they are still on calendar.

Q. Okay. So this is the first time that you have ever been required or called upon to actually testify at a trial concerning any information that you've given to the FBI; is that correct?

A. That's correct, sir.

* * *

(p. 51) Q. Now, you got to Raybrook around September the 20th, you spent about seven or eight days down in the hole, or in solitary, or whatever they call it.

A. Administrative detention they call it.

Q. Administrative detention.

(p. 52) And then you were put into the general population. Did Mr. Ticano, Agent Ticano from the FBI, ever have occasion to contact you up there at Raybrook Prison?

A. One personal interview.

Q. Okay. You say one personal interview. Was that the interview that took place on October 20th, 1983?

A. I don't remember the date, but we have did have one interview so that could be it.

Q. Okay. The day as I recall -

A. The dentist.

Q. - you were in the dentist chair?

A. Yes.

Q. Remember that day?

A. Yes, sir.

Q. Was that the first time you had a personal interview with Walter?

A. Yes, sir. In the prison.

Q. At the prison?

A. Yes.

Q. Okay. Prior to that day, had you made any telephone calls to Walter Ticano?

A. Yes, sir.

Q. And how often had you done that?

A. I usually called him at least a minimum of (p. 53) once a week, maybe more.

* * *

Q. Did anyone else up at the prison know you were a confidential FBI informant?

A. No, sir.

* * *

(p. 54) Q. Okay.

* * *

Wasn't there a point in time when Ticano told you to get more information concerning Fulminante's involvement in the homicide?

A. Yes, there was.

* * *

(p. 55) Q. Okay. And it was on the phone then that he told you to try to develop more information?

A. He says, "Get me something to look at."

Q. Okay. And then you went out and on one of your usual walks with Mr. Fulminante, you approached the subject of his telling you the true story?

A. That's correct, sir.

(p. 56) And the reason that you told him to tell you the true story was because he had told you stories prior to that; is that correct?

A. That is correct.

* * *

Q. And that was the only conversation that you recall having with him?

A. No. There were other conversations concerning, like, in generalities of it, that he was worried that Mesa was going to come and get him for it, and they were going to be waiting for him when he got (p. 57) out. And they were going to pick him up and bring him back.

* * *

(p. 63) Q. *** Okay. Mr. Sarivola, you have a group of men who are doing time in prison; is that correct?

A. That's correct, sir.

Q. Some of them have committed murder, burglary, robbery; correct? Extortion?

A. That's correct.

Q. If a prisoner, if a fellow prisoner is known to have sexually assaulted and murdered a little child, is he considered accepted by the general population or is he ostracized and possibly in danger from the general population?

A. The latter part, ostracized and possibly in danger.

Q. Okay. Thank you, Mr. Sarivola.

Now, do you recall when Mr. Fulminante was released from prison?

A. It was after the New Year. I don't remember the date, sir.

Q. Well, was it in the spring?

(p. 64) A. It was in the spring.

Q. Late spring? May?

A. I'd say somewhere around May.

Q. May of '84?

A. That would probably be correct.

Q. Okay. Did you have contact with Mr. Fulminante on the day he was released from prison?

A. Yes, I did, sir.

Q. How did that come about?

A. I picked him up in the city.

* * *

Q. Early evening. Were you alone or with (p. 65) somebody else?

A. With somebody else.

Q. Who were you with?

A. My wife Donna.

Q. Your wife Donna.

A. Who, at the time, was not my wife.

Q. Well, you were apparently - I believe that you indicated -

A. In June of '84.

Q. - in June of '84 that you began living with Donna?

A. No, I began living with her before that, but we didn't get married until June of '84.

Q. Oh, okay. Just a month after you both went over and picked him up at the Port Authority Bus Station approximately?

A. Approximately about a month or so, yeah. I believe it was June 24th, sir, that we -

Q. That you went?

A. Right.

* * *

(p. 68) Q. Okay. Now, you said that you recalled being interviewed by Mark Jones, and I think we agree that was on August 21st, 1984?

A. That's correct.

Q. That first interview, Mr. Scull was there?

A. Yes, sir, and another gentleman from his office. I don't recall his name. I have never seen him before or after.

Q. Okay. Do you recall at any time during that particular conversation with Mr. Scull and Detective (p. 69) Jones, ever mentioning to them anything about Fulminante claiming he had sexually assaulted the child prior to killing her?

A. No, sir, I did not.

Q. Do you recall ever mentioning during that initial conversation telling Jones or Scull that he said he had choked her or tortured her prior to killing her?

A. Yes, I do remember it.

Q. You did tell them that?

A. That's correct.

Q. And if Officer Jones does not recall that, or has not put that in his report, then he was incorrect?

A. Well, that depends on Mr. Jones, what he wrote.

* * *

(p. 75) Q. Okay. When did you go into the Protective Witness Program?

A. I was accepted in September, '84.

Q. Just so that you and I can remember these dates, Mr. Sarivola, more me than you, because I'm sure you're more aware of them, when did you first start, I guess, living with Donna, you know, rather than just (p. 76) dating her?

A. End of February, beginning of March.

Q. Of '83?

A. That's correct.

Q. You got out of prison the end of November, '82?

A. The day before Thanksgiving, 1982, so it would be the 27th.

Q. Okay. And then the next thing we talked about was Mr. Fulminante getting out of prison?

A. That's correct.

Q. And that was?

A. May.

Q. Of '83. But you call him Red, don't you?

A. That's correct.

Q. It's a lot easier to write than Fulminante.

Now, he had confessed to you sometime in or about October to November -

A. Right.

Q. - of '82 when he was in the prison?

A. That's what I said. That's what I said.

Q. And this is, of course, the ride to Penn. the same day?

A. Right.

Q. And then we have August of '84 you talked to (p. 77) Jones?

A. Correct.

Q. And June of '85 you talked to Barker?

A. Correct.

Q. And August - I'm sorry, yeah, August of '85?

A. Sioux Falls.

Q. Right.

Q. Donna and you talked to -

A. K. C. and Mark Jones.

Q. Right. Now, we have got the proper sequence in fact of time. Oh, we forgot one thing. When did you go into the Protective Witness Program?

A. That was in September of '84.

Q. Okay.

A. You got a space there?

Q. Yeah. Okay. So during this whole period of time, you and your wife never discussed the conversation that you had with Fulminante in October or November of '82, is that your testimony?

A. That is correct, sir.

Q. And from May of '83 your wife never discussed with you what Fulminante had said in front both you through August of '85?

A. No, sir, that's not entirely true.

(p. 78) Q. Okay. Then she did discuss something with you?

A. Well, at the end of the ride and when we were alone for a few minutes, we had went to the nightclub that I had a partnership in.

Q. After you returned from Penn.?

A. Right.

Q. Okay.

A. And she was, you know, she was telling me that she was very, very upset about it. She was very pissed off.

Q. All right. Now, by the way, during that period of time here from February, March, April, May of '83, were you a paid confidential informant to the FBI?

A. Yes, sir.

Q. Were you making continual reports to the FBI about certain activities of personnel -

A. Yes, sir.

Q. - that they might be interested in?

A. Yes, sir.

Q. Correct?

A. People that I was working with.

Q. Right. Did you report to Agent Ticano the fact that you were picking up Red, Lester Fulminante, the day that he got out of prison?

(p. 79) A. Yes, sir.

Q. You told Ticano that; correct?

A. Yes, sir.

Excuse me, sir.

THE COURT: Yes.

Q. BY MR. KOOPMAN: When you -

THE COURT: Hold on a minute. We'll take a short break at this time. The witness has asked to use the restroom.

We'll stand at recess for a few minutes, ladies and gentlemen. Please use the facilities for a few minutes.

(Whereupon, a recess was taken.)

THE COURT: All right. Let the record show the presence of the Defendant, both Counsel of record, and the Jury.

Mr. Koopman, you may proceed.

Q. BY MR. KOOPMAN: Yeah. If you recall, Mr. Sarivola, that August, '84 meeting with Officer Jones, that fellow right there -

A. Yes, sir.

Q. - was Mr. Scull present at that particular meeting?

A. Yes, sir.

Q. Was that the first time you met Mr. Scull?

(p. 80) A. First time I met Mr. Jones, too.

Q. Okay. So up until August of '84, you didn't even know Mr. Scull existed; correct?

A. That's correct, sir.

Q. All right. Now, we're looking at some of these dates and you indicated that except for - I think you said you had stopped at your nightclub -

A. On the way back.

Q. - when you got back from -

A. Right.

Q. - Pennsylvania; correct?

A. That's correct, sir.

Q. And at that point in time, your wife Donna said - made some comment about this - about Fulminante or about what Fulminante had said in the car?

A. That's correct.

Q. Okay. Did you make a report to Agent Ticano that Mr. Fulminante had, again, made incriminating statements concerning his involvement in the death of that little girl here in Arizona?

A. That's correct.

Q. You told them? When did you tell them?

A. I believe it probably was the next day.

Q. The next day. Did you tell them Donna was in the car?

(p. 81) A. No, sir.

Q. Why would you not tell them that Donna was with you?

A. Because I did not want her involved in it.

Q. Oh, I see. But you do recall telling him that he did make incriminating statements?

A. Right.

Q. Okay. The reason for that was you did not want to get her involved; is that correct?

A. That's correct.

Q. All right. Now, you gave some testimony concerning what Mr. Scull described as a doctored tape, do you recall that?

A. Yes, sir. Yes, sir.

Q. Well, if a doctored tape might mean that we - a true tape was made, and then that tape was fooled with?

A. Additions and subtractions.

Q. Right. Is that correct, is that the definition of "doctored" as far as you are concerned?

MR. SCULL: I'm going to object. I don't recall using the term doctored. I know I used the words false tape many times.

THE COURT: Okay. Overruled.

Q. By MR. KOOPMAN: So this was not a doctored (p. 82) tape, was it?

A. No, that's just a terminology that I was referring to it.

Q. Okay. In fact, what it was, was a completely false tape?

A. That is correct, sir.

Q. Okay. Except where you introduce yourself at the beginning of the tape and then Agent Ticano introduces himself at the end of the tape, that's true?

A. That's correct.

Q. That's correct. Oh, okay. And you indicated that the reason you did that was because you felt pressured by Agent Ticano and felt you had to give him something to keep him off your back?

A. No. I was giving him other information but he wanted this particular person done, and at that period of time, it was very difficult.

Q. Okay.

A. And I did it to get him off my back just like I said.

Q. By the way, that was February of '84?

A. That's correct.

Q. Correct?

A. '83, sir. February of '83. February, '84, I was in the Witness Protection Program.

(p. 83) Q. No, you didn't go into the Protected Witness Program on September, '84, according to what you told us?

A. September, yes, correct. Yes, it's '84.

Q. So it's February of '84?

A. I was thinking -

Q. Now, Mr. Scull asked you, did anything bad happen to the other person whose voice you imitated or tried to imitate on the tape; is that correct?

A. That is correct, sir.

Q. He asked - remember him asking you that?

A. That's correct.

Q. Well, if you eventually admit to the FBI that it was a false tape, and false information, they would have no reason to do anything to Mike about this tape; isn't that correct?

A. That's correct, sir.

Q. All right. Now, you indicated that right after you turned that tape over to Officer Ticano or Agent Ticano your conscience started to bother you?

A. That is correct, sir.

Q. And you didn't talk to Agent Ticano for some time?

A. He called me. When he would call me, I would talk to him, would be very short and get off the phone with him.

(p. 84) Q. And he began, then, to feel, I think was your testimony, that perhaps there was something wrong in your relationship with him?

A. He knew what it was.

Q. He knew what it was. How do you know he knew what it was?

A. I just had that feeling. He knew what it was.

Q. Oh, okay. Did he ever say anything to you about that tape?

A. Yes, a few weeks down the road.

Q. A few weeks down the road? What did he say?

A. He asked me if I would - if I was sure that everything was okay with that tape, and I just refused to talk to him about it.

Q. Didn't you deny that there was anything wrong with that tape?

A. That's right.

Q. So you did not just refuse to talk to him about it?

A. No, but I had said, you know, everything is okay, just leave me alone about it.

Q. Okay. Didn't he tell you - by the way, doesn't he live in Hauppauge, Long Island?

A. I do not know where he lives.

(p. 85) Q. Okay. The conversation that falsified was that supposed to have taken place in Hauppauge?

A. No.

Q. Or in Long Island?

A. In Westbury.

Q. Westbury?

A. Westbury-Hicksville area.

Q. Is that correct?

A. Yes. That is correct.

Q. When in fact the tape was actually made in Brooklyn?

A. In Brooklyn, New York.

Q. Okay. And didn't there come a time when Agent Ticano confronted you and said, "Hey, pal," or words to this effect, "We have checked the background noises on this tape and we don't believe it was made in Westbury-Hicksville, Long Island"?

A. But that was after the first time he had spoke to me about it.

Q. And this is several weeks later?

A. Well, total yeah.

Q. And in all of that time, your conscience was bothering you; correct?

A. Correct, sir.

Q. And when he mentioned that he believed that (p. 86) the background noises were not those of the Long Island area but were of Brooklyn, did you then admit that you had made this phoney tape?

A. No, sir.

Q. Oh. Conscience was not bothering you that much, was it?

A. Still was.

Q. Okay. And then, have any more conversations with you about this tape?

A. A few, a couple of times on the phone.

Q. This is after he mentioned to you he didn't like the background noises?

A. Yeah, a couple of times undocumented, unofficial conversations that he would call and talk to me about it. And I still didn't want to come forward about it.

Q. Well, tell us how you came about to eventually admit that that was a phoney tape that you had produced yourself?

A. During a polygraph session.

Q. Okay. In fact, it was after you failed the polygraph that you finally admitted it; is that correct?

A. That's correct.

Q. Okay. And how much after the date of which your tape was originally given to Agent Ticano did you (p. 87) finally admit that it was a phoney tape?

A. I don't remember the date of polygraph, so, you'd have to refresh me on that.

Q. Well, I don't know the date of polygraph either, Mr. Sarivola. But you said it was about several weeks; several weeks, a month?

A. I'd say anywhere from a month to six weeks.

Q. Okay.

A. I failed on that point and passed on three other subjects.

MR. KOOPMAN: Judge, would you please direct the witness to please answer my questions, and not to give his free speeches to the Court.

THE COURT: Just answer the question that's asked, Mr. Sarivola.

THE WITNESS: Sorry.

Q. BY MR. KOOPMAN: Now, Mr. Sarivola, you then, of course, were interviewed we said, on August 12th, 1985; is that correct?

A. Yes.

Q. That was by Mr. Scull again and Mr. Jones again?

A. August 12th, no. It was in the 20's.

Q. Well, let me show you a copy of a police report that I have and perhaps that will help refresh (p. 88) your recollection.

A. Okay.

Q. August 12th?

A. August 12th.

Q. Okay, thank you. When for the first time or was this the first time that you told anyone that Mr. Fulminante drove the little girl into the desert on a motorcycle?

A. I believe so, yes, sir.

Q. That's the first time; isn't that correct?

A. Yes, sir.

Q. And this is the third time you're being questioned by Arizona people, and during this whole period of time, of course, you are in contact with the FBI?

A. Are you talking, sir, about the first interview with Mr. Jones, which I believe that you are talking about, or the third?

Q. No, I said August 12th, 1985. I pointed to it up here, Mr. Sarivola.

A. Okay.

No, that was not the first time.

Q. When was the first time you said that he went into the desert with a motorcycle?

A. I had told Special Agent Walter Ticano.

(p. 89) Q. When did you tell him that?

A. That was about three or four days after I got out of prison and we were discussing it.

Q. Okay.

A. Roughly that first Monday after Thanksgiving we met.

Q. So you discussed this case with Walter Ticano shortly after leaving prison?

A. That's correct, sir.

Q. And you told Walter at that time that Fulminante had taken the little girl out into the desert; is that correct?

A. That's correct, sir.

Q. On the motorcycle?

A. That's correct, sir.

Q. Did you tell that to the Arizona people in August of '84?

A. I believe so, sir.

Q. Did you tell it to them in June of '85?

A. Yes, sir.

Q. And you told it to them again in August of '85?

A. Yes, sir.

Q. So you had contended all along -

A. That's correct, sir.

(p. 90) Q. - that he took her out in the desert on a motorcycle?

A. Yes, sir.

Q. Did you tell Officer Jones on August 12th, 1985, that Fulminante had sexually assaulted the little girl prior to killing her?

A. On June 12th, 1985?

Q. August 12, 1985.

A. Yes, sir I did.

Q. The last - okay. And did you also tell him at that time that he made the child beg, and then shot her in the head?

A. Yes, sir.

Q. Okay. And you told that to - did you tell that to anybody before?

A. I believe so.

Q. Okay. Did you tell it to Ticano?

A. Yes, sir. We discussed it in general, in more than generality. We have discussed it at length.

Q. Specificity?

A. Yes.

Q. And this was sometime in November after Thanksgiving of '82?

A. Right. We got together a few days after I got out of prison the following Monday because (p. 91) Thanksgiving was at the end of the week.

Q. And you recall at this time telling that to Jones in your first interview in August, '84; correct?

A. As far as I can remember, yes, sir.

Q. And to Barker in June of '85?

A. Yes, sir.

Q. Okay.

MR. KOOPMAN: Your Honor, may I have a moment to just gather, my -

THE COURT: Sure.

Q. BY MR. KOOPMAN: Mr. Sarivola, you indicated during your testimony that you received no payments from the FBI while you were in prison; is that correct?

A. Yes, sir.

Q. Do you recall when you first started getting paid by the FBI?

A. I would say somewhere around March or April of '83.

Q. Okay.

A. That's when I started working for them, so -

Q. All right. And when was the last payment that you received from the FBI? Would have been in September of '84 when you went into the Protective Witness Program?

(p. 92) A. Correct.

Q. And during that period of time, from April of '83 to September of '84, do you know how much money you actually received from the FBI for your information?

A. No, sir.

Q. Well, let me show you this document and see if this helps refresh your recollection. That's a document that I was given by Agent Ticano. Look at that and see if that helps refresh your recollection.

A. If this is what Special Agent Ticano said there was, then it must be what it was. I did not keep an accounting of that.

Q. And how much does the document allege that you were paid by the FBI for your information?

A. \$22,490.

MR. KOOPMAN: Thank you. May I have this marked, please? I think it's Exhibit No. 36.

MR. SCULL: No objection when it's offered, and we have a copy.

THE COURT: That's Exhibit 36?

MR. KOOPMAN: This is Exhibit 36.

THE COURT: Exhibit 36 is admitted.

Q. BY MR. KOOPMAN: Would you look at Exhibit No. 36 in evidence, Mr. Sarivola. Do you recognize that document?

(p. 93) A. Yes, sir. This is my formal agreement with the United States Government.

Q. Okay. Now, earlier on in your - by the way, is that your signature on the second page?

A. Yes, sir, that is my signature.

Q. And it's dated August 15th, 1984; is that correct, sir?

A. That's correct.

Q. Now, in earlier testimony on direct examination by Mr. Scull, you indicated that except for being paid, you received no other benefit for your information or your testimony; is that correct?

A. That's correct, sir.

Q. Let me ask you to do me a favor, Mr. Sarivola. Would you please read the third and fourth paragraph on the first page?

A. "It is further agreed that in the event that you are prosecuted" -

Q. No, above that; start with the paragraph above that.

A. "It is agreed that no information," that one?

Q. Yes.

A. Okay. "It is agreed that no information or testimony given by you (both before and after the making (p. 94) of this agreement), or evidence derived from information or testimony given by you, will be used against you in any criminal proceeding other than indicated below."

Q. Okay. And now read the next.

A. "It is further agreed that in the event that you are prosecuted by any other law enforcement authorities in connection with any violation of the law, this office will bring to the attention of those prosecuting authorities the cooperation which you have furnished in connection with this agreement."

Go on sir?

Q. Yeah, why don't you read the next paragraph?

A. "It is further agreed that this office will seek to place you in the Federal Witness Security Program along with your wife, children, and any other associates who become in need of protection as a result of your cooperation with this office."

Q. Now, let me ask the question again, Mr. Sarivola, now that you've had a chance to refresh your recollection with this document.

Have you received as a condition of your cooperation with the FBI in the investigation of organized crime or other criminal activity, any other benefits other than the \$22,490 you received in cash?

A. In what respect, the Witness Protection (p. 95) Program?

Q. You got the Witness Protection Program for yourself and your wife's children?

A. That was necessary to maintain life.

Q. Okay. You also received a promise that they would not prosecute you for any information derived from the information which you gave them; is that correct?

A. That is correct.

Q. You also received a promise that if you were arrested by any other law enforcement agency for any other crime, is the words here, that they would, the FBI would go and they would tell them what a good fellow you are and how you've cooperated in furnishing information pursuant to this agreement; is that correct?

A. That is correct.

Q. Don't you consider that benefits?

A. No, sir.

Q. Well, let me ask you this then. Aside from the extortion charge for which you were convicted and sentenced to prison, does the FBI have any information about you concerning your involvement in any other crimes or criminal activity?

A. No, sir.

THE COURT: Did you have -

MR. SCULL: I had an objection. Obviously, (p. 96) judge, the witness answered. I just don't - we can't open the FBI files.

THE COURT: The answer will stand.

You may ask your next question.

MR. KOOPMAN: Thank you, Your Honor. I have no further questions of this witness.

* * *

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
)	
Plaintiff,)	
vs.	)	CR-142821
ORESTE C. FULMINANTE,)	
)	
Defendant.)	
_____)	

Phoenix, Arizona
December 12, 1985
1:35 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A. GERST,
JUDGE

Reporter's Transcript of Proceedings
Volume VII - Trial

* * *

(p. 5) WALTER TICANO,
called as a witness herein, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCULL:

Q. Would you state your name and occupation,
please, sir?

A. Walter Ticano, Special Agent, Federal Bureau of
Investigation.

(p. 6) Q. During your employment with the FBI, did
you come to know a man named Anthony Sarivola?

A. Yes, I did.

Q. And can you tell us when you first met or came to know Anthony

A. I first became aware of Anthony Sarivola approximately September of 1982. He became involved in a case that I was pursuing. He was involved in shylarking (p. 7) and subsequently he was arrested in my case for shylarking.

Q. Could you define shylarking for us, please?

A. It's an extortionate credit transaction in which exorbitant interest rates are charged for a loan.

Q. And he was subsequently convicted of that charge -

A. That's correct.

Q. - was he not, and went to prison, didn't he?

A. Yes, he did.

Q. All right. At some time, did Anthony Sarivola come to you, and make you some sort of proposition that he would furnish information to you concerning organized crime figures?

A. Yes, he did.

Q. And did you enter into some agreement with him?

A. Yes, I did.

Q. And this is with the approval of your Bureau, was it?

A. That's correct.

Q. Was this before or after he went to prison?

A. He came to me after he was sentenced for his crime, but before he went to prison.

(p. 8) Q. Did you have any impact on what kind of prison sentence he received at that time?

A. No, I did not.

Q. And when he went to prison, did he - was he in your employ at that time, could we say, or was he working with you at that time?

A. He was still a confidential informant.

Q. And did you have contacts with him while he was in prison?

A. Yes, I did.

Q. And were some of those in person and some of those telephonic?

A. That's correct.

Q. Now, you, from time to time, file reports as part of your job, do you not?

A. Yes, I do.

Q. I want to refer you to what purports to be a report of yours. is that true, what that is?

A. Yes, this is my report.

Q. And what is the date of the report?

A. Well, the date of transcription, the date it was typed was November 1st, 1983. However, the information was provided to me approximately October 20th, 1983.

Q. You say approximately?

(p. 9) A. Well, it could have been the day of the 20th or the a.m. of the 21st.

Q. All right. And do you have a personal recollection now as you sit on the stand of receiving this information?

A. Yes, I do.

Q. And would you state what information you received from Tony Sarivola?

A. Tony contacted me by phone, and told me that he had engaged in a conversation with Oreste Fulminante in which Fulminante told him that he had killed his daughter, and that he used a .357 magnum to kill his daughter.

Q. All right. Did you get any more details than that at that time?

A. No, I didn't.

Q. Why didn't you?

A. The prison telephones were spot monitored by the corrections offices so normally when we'd have a conversation, it had to be very quick, and, you know, just conducted business as quickly as possible, and get off the phone.

Q. All right. Were the prison authorities aware that Mr. Sarivola was an informant for the FBI?

A. Absolutely not.

(p. 10) Q. Was he able to furnish you other information at that time from the prison?

A. Yes. He was gathering information about people and from people who were up in the prison with him, and also, he was in, you know, telephone contact with people back in Brooklyn and he would relay some of that information to me about Brooklyn, as well as the prison.

Q. All right. What was the credibility of that other information that he gave to you at that time?

MR. KOOPMAN: Objection, Your Honor, irrelevant.

THE COURT: Overruled. He may testify to the general credibility of other information.

THE WITNESS: Information I received from Tony, most of the information was verified from independent investigation or from other source information, source information meaning other informants, and a certain small percentage of that remained unsubstantiated because we weren't able to verify it.

Q. BY MR. SCULL: Are you saying that you couldn't verify it or disprove it either way?

A. That's correct.

Q. And that's a small percentage you said. All right.

(p. 11) When Mr. Sarivola then came out - well, let me - first of all, did you ask him, at that time, of this report, to go back and try to find out more about what was going on with this -

A. Let me just back track a moment. Prior to October 20th, and I don't have the dates because no report was made of it; sometime early in October, he told me on the phone, "Do you know who I'm up here with?"

And I said, "No, what do you mean?"

And he said, "Well, there's some guy up here that has killed his daughter."

And I said, "Well, you know that I don't know anything about it. Why don't you see if you can find out more about it and report it back to me."

Q. So that was the report back to you that you made the reference to?

A. Yes.

* * *

(p. 12) Q. *** After Mr. Oreste Fulminante (sic) was released from prison, did you keep in contact with him?

A. With Tony?

Q. Yes.

A. Yes, I did.

Q. Did he return to the Brooklyn area?

A. Yes.

Q. And was he working for your agency as a confidential informant?

A. He continued to be a confidential informant.

Q. And did you pay him something for his services?

A. We paid him expenses and we also paid him for information. We called it C.O.D. Afterwards, we (p. 13) verify the information; we pay them for that information.

Q. And so you did make payments to him; is that correct?

A. Yes. Yes.

Q. And is that only for information that you were able to verify from other sources?

A. Yes.

Q. There came a time, did there not, Agent Ticano, that Mr. Sarivola provided you with a phoney tape recording?

A. Yes, he did.

Q. Do you recall approximately when that was?

A. January of 1984.

Q. Do you recall any of the circumstances of your receiving that phoney tape?

A. Yes. Tony was involved in numerous things, but particularly we had this one operation against this fellow, Mike, and it was moving very slowly at the time.

And I was receiving pressure from my boss, and so I kind of leaned on Tony to accomplish, you know, the task that we had set out to do, and I guess he felt pressured, and he created a conversation with this guy Mike.

Q. All right. You received this tape from Tony, right?

(p. 14) A. Yes, I did.

Q. And you listened to it?

A. Yes.

Q. What was your reaction to it when you first heard it?

A. Okay. After I received the tape, it was about three or four days later when I was able to actually listen to it in cassette form. And my first reaction to it was that the background noise and the - just wasn't consistent with where that tape recording was supposed to have been made.

It was supposed to have been made in a Brooklyn street and I was just - I was suspicious of the tape.

Q. What did you do about it?

A. Well, I confronted Tony about it and I gave him the opportunity to tell me that it wasn't real and he insisted that it was real.

Q. Do you recall about how much time expired between your listening to the tape and then asking Tony about it?

A. Probably about a week. And then -

Q. I'm sorry.

A. I'm sorry.

Q. What happened to your relationship with Tony (p. 15) during this period?

A. He kind of went his own way, and he was avoiding me. I was avoiding him. You know, there was something wrong. And we were both aware of it.

Q. All right. But sometime, you brought this to a head, I assume?

A. Yes. I initiated a polygraph examination. And not myself personally but, you know, somebody who is a technician.

Q. And what happened to him?

A. Well, he took the test and he failed it. He continued to insist that it was a real tape.

Q. And did you confront him then with those results?

A. Yes, sir. He then admitted that he lied.

Q. All right. So did he continue to work for the Bureau after this time?

A. Yes, he did.

Q. And was he still providing information C.O.D. as you referred to it?

A. Yes.

Q. And did he provide - actually do that? He actually did provide information?

A. Excellent information.

Q. Was Tony able to be helpful to the Bureau as (p. 16) far as making any major cases?

A. The cases are still in progress, and there are since investigations, but he will be called upon to testify in these cases.

Q. And what are we talking about here; are these high ranking people or not?

A. We're talking about soldiers, and captains, and the various organized crime families.

Q. And is it fair to say that he's helpful to you in several or many cases?

A. He's provided testimony to various agents in approximately 10 to 15 cases.

Q. And what kind of cases are we talking about?

A. We're talking high level organized crime cases.

Q. Are we talking about shaftlifting, or -

A. No, we're talk murder, shylarking, hijacking -

Q. Major cases?

A. - et cetera. The normal.

Q. I think you paid through your Bureau some twenty-two thousand four hundred and some odd dollars if I remember the round figure. Was all of that payment for information that was verified or corroborated in some way by you?

(p. 17) A. Not all of it because part of that is expenses that he would incur in, you know, running around town, whatever he had to do; gasoline, car rentals, phone calls, meals, nights out on the town with his buddies. You know, stuff like that.

Q. All right. And the rest of the money went for verified information; is that correct?

A. That's correct.

Q. It's also true that Tony has received some benefits from the Federal Witness Protection Program, is that not true?

A. That's correct. He's a member of the Federal Security Program.

Q. All right. And I think there's also another benefit that if he would be prosecuted by any other law enforcement authorities, your office would bring to their attention his cooperation with you in the past?

A. That's right.

Q. And that you wouldn't use evidence that you secured from him to prosecute him with, is that true?

A. That's right.

Q. Are there any other agreements that we don't know about?

A. None with the FBI that I'm aware of.

* * *

(p. 18) CROSS-EXAMINATION

BY MR. KOOPMAN:

(p. 20) Q. * * * Agent Ticano, you've just been given a document that I have asked you to look at, is that correct, sir? What is the date of that document?

A. 10-20, 1983.

Q. Okay. And the information contained in that document, was that received from Mr. Sarivola?

A. Yes, sir.

Q. Was that received by phone or in person?

A. In person.

Q. And was that actually on October the 20th?

(p. 21) A. Yes, sir.

Q. I mean, that wasn't maybe the 20th or maybe the 21st?

A. It was the 20th.

Q. It was the 20th. Now, do you have the other 20th document there?

A. Only this.

Q. That one, okay.

MR. KOOPMAN: May I ask that this document be marked, please?

Q. BY MR. KOOPMAN: I'd like to show you a document that's been marked as Exhibit No. 37 and ask you if you recognize that document?

A. Yes.

Q. And I believe that Mr. Scull asked you the date upon which you received the information, upon which that document was based?

A. Yes.

Q. Is that correct?

A. Uh-huh.

Q. Is that correct, sir?

A. That's correct.

Q. And you indicated, at that time, that even though it says October 20th, that it could have also been the morning of October 21st; is that correct?

(p. 22) A. That's correct.

Q. And is that - well, I'm going to ask you: Thinking back, was that information garnered by you from Mr. Sarivola the night of the 20th or the morning of the 21st?

A. I received a phone call in the a.m., which would have to have been the 21st.

Q. Okay. Agent Ticano, do you recall being interviewed by me on October the 21st, 1985?

A. Yes, sir.

Q. Do you remember us talking about exactly this same situation?

A. Vaguely.

Q. I'm going to read to you from page 18 of that document, of the transcript report of our recorded conversation and see if this helps refresh your recollection.

"Walt Ticano: Now I think it was October 20th is the day that I actually went to Raybrook on an unrelated matter and sat down with Tony and had a discussion. At that time, he gave me a bit more about it, and I said, look, I gotta know the whole story. Get me the whole story.

"Koopman: Okay.

(p. 23) "Walt Ticano: Ask him what it's all about and then I get that information by telephone that night. Those documents may be a little bit misleading about the dates because I was traveling up there, I was actually there and then there was a subsequent phone call in addition to that."

Does that help refresh your recollection as to when you received the call from Tony?

A. I said before you started to read from this communication that I had received the call in the a.m. of the 21st, which is the night of the 20th. It's the night, right? It's dark out.

Q. I'm sorry, what time in the morning are you referring to?

A. Probably 12:15, 12:30 a.m.

Q. Okay. So we're talking shortly after midnight of the 20th?

A. Thereabouts.

Q. Thank you. Now, I'd like you to again look at that document and tell me if you prepared that document?

A. I didn't type it.

Q. Did you -

A. I wrote it. In essence, I wrote it, yes, sir. Yes.

(p. 24) Q. And you checked it over after it was typed?

A. That's correct.

Q. And does that contain what you recall of your conversation with Mr. Sarivola on the early morning hours of the 21st?

A. That's correct.

Q. And is that document kept in the ordinary course of business of the FBI?

A. Yes.

MR. KOOPMAN: Your Honor, at this time, I would offer No. 37 into evidence.

MR. SCULL: No objection.

THE COURT: Exhibit 37 is admitted.

Q. BY MR. KOOPMAN: Now, I'd like you to look at the document, Agent Ticano. In fact, would you read the paragraph that refers - the second part of the paragraph - I'm sorry, the second paragraph which refers to the information you received from Sarivola.

A. Sarivola telephonically advised me that Oreste Fulminante told him in confidence that he, Fulminante,

had killed his stepdaughter. Sarivola said that Fulminante said that he did not like his stepdaughter and accused her of causing problems between himself and his wife. Sarivola stated that Fulminante stated that he took his stepdaughter out into the Arizona (p. 25) desert and killed her with a .357 magnum handgun.

Q. Okay. Now, you indicated that you've been with the FBI some nine and a half years?

A. Yes.

Q. And you've been in organized crime for five years?

A. Yes.

Q. And you've been to a number of in-service training programs, correct?

A. That's correct.

Q. And you, of course, went through the FBI Academy, which is a rather lengthy study period?

A. Yes.

Q. And you were taught investigative techniques, were you not?

A. Yes.

Q. You were taught report writing, were you not?

A. Yes.

Q. On that night, when you received the telephone call from Mr. Sarivola, did Mr. Sarivola ever indicate to you that Mr. Fulminante indicated he had sodomized or raped the child?

A. No.

Q. Did Mr. Sarivola ever indicate to you that (p. 26) night in that telephone call that Mr. Fulminante had choked or tortured the child prior to shooting her in the head?

A. No.

Q. Did Mr. Sarivola ever indicate to you that night that he drove the child out to the desert on a motorcycle?

A. No.

Q. Okay. Now, I believe in our interview I asked you whether or not there were other documents or reports relating to information you had received from Sarivola concerning Fulminante's participation in the murder of Jeneane Hunt; is that correct?

A. That's correct.

Q. And you indicated to me that there were no others?

A. That's correct.

Q. And I believe you also indicated to me that the - you had received no additional information from Sarivola outside of what was in that report, because had you received additional information, you would have put it in the report?

A. That's correct.

Q. Is that right?

A. Absolutely.

(p. 27) Q. So would it be fair to say that up and until the time that Sarivola made contact, the original contact with Maricopa County, whether it was K. C. Scull or this officer over here, Officer Jones, he had never said to you, "Fulminante told me he raped or sodomized the girl;" is that correct?

A. That's correct but I never pursued it, either. Because now -

Q. Mr. Ticano, just -

MR. KOOPMAN: Please, Your Honor, would you ask him to just answer my questions.

THE COURT: Just answer the question that's asked of you.

Q. BY MR. KOOPMAN: Agent Ticano, did Sarivola ever say to you prior to his being questioned by people from Maricopa County, "Hey, Walter, Fulminante told me he raped or sodomized the kid before he killed her"?

A. No.

Q. Did he ever tell you, "Hey, Walter, before Fulminante killed the girl, he choked or tortured or strangled her"?

A. No.

Q. And if he had, you would have put in a report about that; is that correct?

A. That's correct.

(p. 28) Q. And you've given me all of your reports; is that right?

A. You have everything.

Q. There's nothing in any of those reports that reflect on any such statements being made by Sarivola?

A. No.

Q. Correct, okay. Now, you also talked about his general credibility while he was up at the jail and giving you information; is that correct?

A. Yes.

Q. And you said that most of the information you were able to substantiate, but some of it you were unable to substantiate?

A. That's correct.

Q. Therefore, would it be fair to say those areas that you did not substantiate, you cannot sit there and absolutely say, without any doubt whatsoever, were true?

A. I can't.

* * *

(p. 30) Q. Now, Mr. Sarivola, during the time that he was actively involved as your paid, confidential informant, was - on occasion, made tape recordings of telephone conversations of people; correct?

A. Yes.

Q. And on at least one occasion that we know of, had tape recorders or wires available to him to tape record conversations between him and other parties; is that correct?

A. That's correct.

Q. At any time, with this availability of electronic recording devices available to him, was he ever able to record either by telephone, or in any other way, any conversations with Mr. Fulminante which related to the death of Jeneane Hunt?

A. No.

Q. By the way, are you familiar with the term snitch or stoolie?

A. Yes.

Q. Is that a common term both in law enforcement and among the general population to be used when talking about a paid, confidential informant?

(p. 31) A. It's more of a street term than a professional term.

Q. A street term, but you have heard it?

A. Yes.

Q. Okay. You indicated that there are a number of cases, important cases to the FBI and the Justice Department, which Mr. Sarivola is involved in; is that correct?

A. Yes, sir.

Q. And do you have the August 15th letter up there? I believe it's marked No. 36.

I'll show you what has been marked Exhibit No. 36 in evidence, and ask you to refer to paragraph 2 thereof. And it indicates in paragraph 2, does it not, Agent Ticano, that the office of the United States Department of Justice

is conducting an investigation of illegal activities on the part of members and associates of the Columbo Organized Crime Family, as well as illegal activities on the parts of members and associates of the Gambino, Genovese, and Lucchese Organized Crime Families; is that correct?

A. That is correct.

Q. And those are four out of the five major crime families in New York City, are they not?

A. They are.

(p. 32) Q. And apparently Mr. Sarivola, without getting into it, because I know it's confidential information at this time, has been supplying you with information concerning all of those crime families and high ranking members of those crime families; is that correct?

A. Yes, sir.

Q. And, in fact, he has testified before before grand juries; is that correct?

A. Yes.

Q. And he'll probably be testifying against a lot of these people if their cases go to trial in New York; is that correct?

A. He will.

Q. Would it be fair to say that his credibility as a witness is very crucial to the prosecution of those cases?

A. Absolutely.

Q. Okay. By the way, when Mr. Sarivola came to you and offered to be a paid informant for the FBI, did he

give you or did you require of him certain information concerning his background so that you could check it out?

A. Yes.

Q. And one of the areas that we spoke about yesterday with Mr. Sarivola was his prior employment with the Seagate Police Department.

(p. 33) Do you recall his being a member of that department or saying he was a member of that department at one time?

A. That's correct.

Q. Did you ever check out his employment record with Seagate Police Department?

A. Yes, I did.

Q. Did you make a determination as to how long he was with that department?

A. Yes.

Q. How long was he with them?

A. Eight months with Seagate.

Q. With Seagate. Do you recall whether in your investigation of his prior employment at Seagate whether he had received any citations for bravery?

A. He received citations. I don't know whether they were for bravery or not.

Q. You were able to verify this through record employment?

A. I was in recent conversations with the United States Attorney that prosecuted Sarivola and his recollection is that there were at least two citations.

Q. Two. Thank you.

Let's go back to that No. 37 there again, will you, please?

(p. 34) A. Okay.

Q. I think it's 37. No, I'm sorry, 36. The other one.

A. Okay.

Q. In your debriefing of Mr. Sarivola, did he admit to you that he had been involved in criminal activity with other parties in the Columbo Crime Family?

A. Of course.

Q. Now, you were the arresting officer in his case on extortion, were you not?

A. I was the case agent. I didn't actually make the arrest.

Q. Okay. Well -

A. Responsible for.

Q. You were responsible for his arrest, were you not?

A. Yes.

Q. Okay. So you knew about that particular crime because you were responsible for his arrest?

A. Yes.

Q. Okay. When was that?

A. September of 1982.

Q. September of '82. Well, yesterday in testimony, Mr. Sarivola indicated to us that when he left the Seagate Police Department - by the way, do you know (p. 35) why he left the Seagate Police Department?

A. He resigned.

Q. Okay. He told us yesterday that he resigned from the Seagate Police Department so that he could participate more fully in criminal activities.

A. That's what he told me as well.

Q. Okay. Now, it would appear from the contents of this letter that in order for him to receive the protection spoken about, he had to relieve his soul to you, so to speak?

A. That's right.

Q. Tell you folks all the criminal activity he had been involved in?

A. That's correct.

Q. And the persons that he was involved with in those criminal activities; correct?

A. Yes, yes.

Q. Are you aware at the present time sitting right there, aside from that one case that you arrested him for, of any other criminal activity on the part of Anthony Sarivola?

A. Yes.

Q. I'm finding it very difficult to phrase my questions because I don't want to get into confidential areas.

(p. 36) Would it be fair to say because of Mr. Sarivola's position in the Columbo Crime Family that his participation in criminal activity was somewhat substantive?

A. Yes.

Q. Would you go down to - let's see, one, two, three, four; I'm sorry, three; the third paragraph in that letter. Is it your understanding from that paragraph that the agreement with the government is that they will not prosecute him, Tony, for any prior crimes to which he has already admitted?

A. As long as he's admitted criminal activity in the past, he'll not be prosecuted for it.

Q. Okay. Now, go down to the next paragraph. It says there, "It is further agreed that in the event that you are prosecuted by any other law enforcement authorities in connection with any violation of the law," and I stress "any violation of law, this office will bring to the attention of those prosecuting authorities the cooperation which you furnished in connection with this agreement." Is that what that said?

A. That's what it says.

Q. Okay. Does that also include murder?

A. It just says, it will bring it to the attention of the authorities. That's all it says.

(p. 37) Q. I'm asking what does any mean?

A. Any crime.

Q. Any crime, including murder. All right.

By the way, talking about Anthony Sarivola, you indicated that he was originally arrested for extortion?

A. Extortionate credit transaction. Shylarking.

Q. Shylarking. And you indicated that shylarking by your definition means lending people money at exorbitant rates of interest?

A. Yes.

Q. Does shylarking also include, just from its connotation, the use or threat to use physical force in the collection of the grease, I think that's the term used in the interest; vigorish is another term; correct?

A. Correct.

Q. Of the collection of those moneys?

A. That's automatically understood.

Q. That there is usually force or threats to use force connected with shylarking?

A. That's correct.

Q. Okay. Would it be fair to say, without going into details, from information that you developed during your investigation that led to the arrest of (p. 38) Anthony Sarivola, that he indeed did use force or the threat of physical force in the collection of shylarking debts?

A. Yes.

* * *

REDIRECT EXAMINATION

BY MR. SCULL:

Q. After Anthony Sarivola told you about Oreste Fulminante's confession to him, was it - did you follow up and attempt to make the case against Oreste Fulminante, or what did you do?

A. No. My function as the handling or case agent of an informant is to disseminate that information to either the various squads of the FBI or to outside agencies that it pertains to and it's their responsibility to follow up on that information; not mine.

(p. 39) Q. In this particular case, was the information concerning his confession to Sarivola given to the Arizona authorities?

A. That subsequently was. Approximately three weeks later, it was provided to Mark Jones.

* * *

RECROSS-EXAMINATION

BY MR. KOOPMAN:

Q. Did you ever receive any information from Sarivola concerning his picking up Oreste Fulminante after Fulminante was released from prison?

(p. 40) A. Yes.

Q. Did he advise you that he picked him up at the bus stop, at the bus station and drove him to Pennsylvania or did he advise you that he went to Pennsylvania and drove him from Pennsylvania to New York?

A. He advised me of both.

Q. Okay. Did you - what did he tell you when he told you that he picked up Fulminante and drove him to Pennsylvania?

A. Nothing.

Q. That's it? Did he tell you that Donna was in the car with him on the ride down to Pennsylvania?

A. I - no.

Q. Did he tell you that Mr. Fulminante had once again confessed his implication in the death of the little girl?

A. He may have mentioned it, and if he had mentioned it, I wouldn't have made a report of it, because it would have been the same information.

Q. Okay. Unless he told you something -

A. Something additional.

Q. - additional like admitted to raping her or he admitted to choking her or torturing her or something like that?

A. That's right.

(p. 41) Q. Okay. How about the report of his picking up Fulminante and driving him back to New York; did he indicate to you whether Donna was with him on that occasion?

A. Not that time. I found out later that she had been with him.

Q. Okay. When he told you about that ride, did he ever mention anything new concerning Mr. Fulminante's - any additional information Mr. Fulminante gave relative to the death of Jeneane Hunt?

A. My best recollection of that whole thing is that he gave me nothing further.

Q. Did he ever mention to you at that time that Fulminante had made statements in front of Donna?

A. No.

* * *

IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA IN AND FOR THE
COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
)	
Plaintiff,)	
)	
vs.	)	CR-142821
)	
ORESTE C. FULMINANTE,)	
)	
Defendant.)	

Phoenix, Arizona
December 13, 1985
1:36 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A. GERST,
JUDGE

Reporter's Transcript of Proceedings
Volume VIII - Trial

(p. 5) DONNA SARIVOLA,

called as a witness herein, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCULL:

Q. Would you state your name for us, please?

A. Donna Sarivola.

Q. And are you married, Donna?

A. Yes, I am.

Q. Who are you married to?

A. Tony Sarivola.

Q. And where were you born, Donna?

A. In Brooklyn, New York.

Q. When were you born?

A. October 30th, 1951.

Q. Do you have any children, Donna?

A. Yes, I do.

Q. How many?

A. One.

Q. What sex and age is she?

A. She is a little girl and she's six years old.

Q. Donna, when did you first meet Anthony or
Tony Sarivola?

(p. 6) A. About 14 years ago.

Q. And at that time, you were each married to other
people, were you not?

A. Correct.

Q. You were just friendly or just describe your rela-
tionship?

A. Oh, the four of us were very good friends.

Q. And eventually, you got a divorce, did you?

A. Yes, I did.

Q. And he was apparently divorced from his wife?

A. Yes.

Q. When did the two of you start to go together or live together or however your relationship started?

A. Well, we started dating; it was approximately March of '83. 1983, I'm sorry.

Q. 1983?

A. Yes.

Q. And when were you married?

A. In June of '83. June 29th to be exact.

Q. So you've been married two and a half years approximately?

A. Yes.

Q. Okay. Donna, when you first started going with Anthony Sarivola, was he involved in any illegal (p. 7) enterprises to your knowledge?

A. Yes, sir.

Q. And do you know generally what that was that he was involved in?

A. Well, it's call shylarking back East where we come from. It's people that loan money out on the street at a higher percentage.

Q. All right. So you knew he was involved in this to some extent?

A. Yes, sir.

Q. Did he discuss his business dealings with you?

A. No, sir.

Q. Okay. Why did you start to go with this man if he was involved in criminal activities?

A. Well, I knew him for years and I knew the person, not what they call the street person, but the person he truly is and which is a totally different person.

And I just felt that we could have a good life together. I knew I couldn't influence him enough to change his ways, become a legitimate, so to speak, person.

* * *

(p. 8) Q. * * * Mrs. Sarivola, did there come a time when you were introduced to a man named Oreste Fulminante?

A. Yes, sir.

Q. Is he present in the courtroom today?

A. Yes, he is, sir.

Q. Could you point him out and describe what he's wearing for us, please?

A. Sure. He's the gentleman sitting at the far end of that table, I guess; wearing, I guess you would call it a plaid shirt with eye glasses.

MR. SCULL: May the record reflect further identification of the Defendant, please?

THE COURT: It may.

Q. BY MR. SCULL: Do you recall approximately when it was that you were introduced to this man?

A. Yes. It was in May or maybe the beginning of June, 1983.

Q. And do you recall the circumstances of being introduced?

(p. 9) A. Yes, sir.

Q. Okay. How was this man introduced to you? I mean what name was given?

A. Red.

Q. Okay. And who introduced him to you?

A. Anthony did.

Q. Was anyone else present at that time?

A. No, sir.

Q. And where was it that the introduction was made?

A. In Anthony's car.

Q. And where were you going in Anthony's car to?

A. To drop Red off in Pennsylvania at a friend's house.

Q. Okay. How had you gotten to the car?

A. Okay. Anthony had picked Red up in Manhattan and they drove into Brooklyn and called me. Anthony had called me and asked me if I would take a ride with him, that he had picked up Red and he was going to drive him out to Vince in Pennsylvania.

Q. And so, you apparently agreed to go along?

A. Yes, sir.

Q. And do you recall what time of the day this was approximately?

(p. 10) A. It was about 4:00 or 5:00 o'clock in the evening.

Q. Okay. And you then proceeded to drive to Pennsylvania. Did you have any conversations with Mr. Fulminante?

A. Oh, Yes.

Q. And would you describe those for us?

A. Sure. The beginning conversations were, you know, "Hello, how are you?" Then we went on to conversations - I refer to him as Red. That's the only way I was ever introduced to him.

Q. All right.

A. Red was saying that, you know, he wanted to make some money. He would like to get a nice car like Tony's. He wanted to know what was going on in the street at the time.

And then I just casually asked him why was he going to Vince DeMarco's house, you know, "Don't you have any relatives that you would want to go see once you get out of prison?"

I couldn't understand why he was going to Vince's house. And he had said he had relatives and he had friends, but that he couldn't go back to where he came from.

Q. All right. Proceed. Tell us.

(p. 11) A. Okay. I then asked him why couldn't he go back. And he had told me about a little girl that he had killed, but that one day, he was going to make it his business to go back there because he wanted to go piss on her grave. And I -

Q. Wait.

A. I'm sorry.

Q. Did he use those words?

A. That's a direct quote. That's a quote I'll never forget. It was a direct quote saying, "I want to go piss on her grave."

Q. Did he ever mention where this was?

A. He never mentioned the State per se.

Q. That it was this state, Arizona?

A. Yes, sir.

Q. Okay.

A. Right. Right. I had asked him what happened. He told me that he had taken her out into the desert, that he had raped her, that he had beat her. Another direct quote was that he had "choked her until he thought he choked every last breath out of her." And he then shot her. I don't remember if it was two or three times in the head.

He said that he had then gone home and his wife had been out at the time, and that when the wife had (p. 12) gotten home, he took the wife out to another part of the desert to look for her and that he couldn't find her.

Q. A totally different part from where he had -

A. Right, right.

Q. Did he ever mention torture?

A. Yes. But I couldn't go into what he meant by that.

Q. Did he ever mention making the girl beg?

A. Yes, sir, he did.

Q. Did you ask him any of the details as to what he was telling you?

A. No, sir I didn't. I was just so thoroughly disgusted by what I heard. I was not expecting to hear anything like that. No, I really didn't go into detail.

Q. Well, what did you feel like?

A. What did I feel like? I felt thoroughly disgusted and I turned around - please pardon my language - I told him that I thought he was nothing but a piece of shit, that I couldn't understand how anybody can do this.

Q. Did he ever tell you why he did it?

A. Once again, please pardon my language; this is a direct quote. Every time he spoke about this little girl, he kept calling her "the fucking little kid that (p. 13) had got in the way of him and his wife."

And I said, "What do you mean by that?"

And he had said, "Well, the kid, the fucking kid was always there and always in the way." They couldn't have the freedom of like a newly married couple, because of the f'ing kid.

Q. Donna, this was in May or early June, I think you said of 1983?

A. Yes, sir.

Q. And when did you first come forward with this information to the Arizona authorities?

A. Anthony had been at a meeting with you people in Lexington, Kentucky, and he had called me from there one night and he had said to me, "Gee, do you remember that conversation that we had in the car where Red had told me about what he had done?"

And he said, gee, it had slipped his mind. He said, "Would you mind if I told K. C. Scull about this?" You know, would I be willing to testify?

And I said, "Sure, tell him." And then he told you about it.

Q. When Mr. Fulminante was giving you this confession, did you believe him when he told you this?

A. Yes, I did.

* * *

(p. 14) CROSS EXAMINATION

BY MR. KOOPMAN:

* * *

(p. 16) Q. Now, you indicated that you first heard this statement from Mr. Fulminante in May or possibly early June of '82; is that correct?

A. No. '83.

Q. I'm sorry, '83, correct?

A. Yes, sir.

Q. Okay. When for the first time - when for the first time did you speak to Mr. Scull or Mr. Jones and tell them what you told this jury today?

A. Okay. It was the meeting after Tony had with them in Lexington, Kentucky. I do not remember the (p. 17) exact date or month. I can tell you where it was; it was in Sioux Falls.

Q. Well, perhaps I can help refresh your recollection here. I have a report here that indicates that you were interviewed the first time on August 13th, 1985?

A. Fine.

Q. Would that be correct?

A. Yes, sir.

Q. It was earlier this year?

A. Yes.

Q. August of '85 - well, let's see. That's a little over two years; is that correct?

A. Yes, sir.

Q. That call from Lexington, Kentucky, that was in June of '85, was it not?

A. I'm really not sure of the exact date.

Q. It was -

A. Approximately, yes.

Q. It was shortly before you were interviewed; is that correct?

A. Yes, yes.

Q. Well, if Tony told us, admitted it was June of '85

A. I don't know what Tony said, and I really (p. 18) don't remember the month.

Q. I'm sorry. If Tony told us it was June of '85, you would have no argument with that?

A. No. No, none at all.

Q. And that would be almost exactly two years after you allegedly heard this statement from Mr. Fulminante; is that correct?

A. Correct.

Q. Well, you've just told the Jury how sick and how upset you became when you heard these terrible things from Mr. Fulminante?

A. Correct.

Q. What did you do about it in May of '83?

A. Nothing.

Q. And what did you do about it in June, July, August, September, October, November, December of '83?

A. Mr. Koopman, there is no reason for you to yell at me.

Q. I'm not yelling at you.

A. You are. You are.

THE COURT: Mr. Koopman, that's correct, and there is no need to yell or raise your voice.

MR. KOOPMAN: I apologize, Your Honor.

THE WITNESS: Thank you, Your Honor.

THE COURT: Ma'am, you don't need to thank (p. 19) me. I'll be responsible for maintaining decorum in the courtroom. You answer the questions he asks, and wait until the questions are completely finished so that you do not clip off the ends, and answer the questions.

Q. BY MR. KOOPMAN: How about the remainder of 1983, who did you tell about this?

A. Nobody.

Q. How about all of '84, who did you tell about this?

A. Nobody.

Q. How about up until June of '85, who did you tell about this?

A. Nobody.

Q. Did you ever see Mr. Fulminante again after that first trip down to Pennsylvania?

A. Yes, sir.

Q. When was that?

A. Once. One more time, Anthony had to pick him up in Pennsylvania and he asked me to please take the ride with him, and I did.

Q. And you drove with him from Pennsylvania back up to New York?

A. Yes, sir.

Q. I thought you found this man very offensive, very distasteful, did you not?

(p. 20) A. Yes, I did, sir.

Q. Did Tony tell you when up went down to Pennsylvania the second time that you were going to be picking Red up?

A. Yes, sir.

Q. Did you ever say to him, "Gee, I don't want to ride with that guy"?

A. Yes, sir.

Q. Why didn't you stay home?

A. Because I didn't want Anthony driving in the car with him alone.

Q. Oh, I see. Looks like he might be dangerous to Anthony?

A. Yes, sir.

Q. Tell me, did you have any discussions with Anthony about the alleged remarks that Mr. Fulminante made to you that day?

A. After we had dropped him off?

Q. Uh-huh.

A. Yes.

Q. What did you tell him?

A. I didn't - I told him I didn't understand how he could have anything to do with a person like that.

Q. Okay. And did you suggest to him that, you know, maybe he ought to drop an anonymous letter to (p. 21) somebody, or maybe tell Walter Ticano from the FBI? Did you ever suggest that to Tony?

A. I did not know Walter Ticano from the FBI at that time, sir. That is -

Q. Did there come a time when you did become aware of Walter Ticano, isn't that true?

A. Yes, sir.

Q. And when would that have been?

A. That was right before Tony went onto the Federal Witness Program.

Q. September of '84?

A. Yes. No. I'm sorry, yes, it was in September.

Q. September of '84?

A. Yes.

Q. Did you have any conversations with Walter Ticano yourself prior to September of '84 when you went into the Witness Protective Program?

A. I did not go into the program in September of '84. I had no conversations with Walter Ticano until after that.

Q. Okay. When did you have your conversations with Walter Ticano?

A. My conversations with Walter Ticano started in October of 1984 when I had been waiting to get onto (p. 22) that program, trying to find what was taking so long.

Q. But you did talk to Walter at that time?

A. About getting onto the program, yes.

Q. From October of '84, through June of '85, did you ever tell Walter Ticano that you had heard Mr. Fulminante make these statements to you in that car?

A. No, sir, I did not.

THE COURT: Wait until he's completely finished with the question and then -

THE WITNESS: I'm sorry.

THE COURT: All right. And then take a breath and then answer it.

Q. BY MR. KOOPMAN: Now, let's go back to what he allegedly told you. by the way, they picked you up in Brooklyn, did they not?

A. Yes.

Q. Do you remember how you got to Pennsylvania, what direction you went?

A. Oh, we got on the Bell Parkway and over the Farazano Bridge and the highway that goes through

Staten Island; and from there, I really don't know the names of the roads.

Q. Okay. How long did it take you to get from Brooklyn onto the Jersey Turnpike approximately?

A. I'd say between a half hour, 45 minutes; (p. 23) somewhere around there.

Q. All right. When did this conversation take place between you and Red?

A. It was about half way through the trip down to Pennsylvania.

Q. Okay. Was he talking to Tony. Red, was he talking to Tony?

A. At different parts of the - different parts of the drive, yes.

Q. But the conversation concerning the death of the little girl took place only with you; is that correct?

A. Yes. Well, I was asking questions and he was answering them.

Q. Okay. And Tony did not cut in or add anything during that conversation, did he?

A. No, sir.

Q. All right. Now, you said as part of it, I believe that he said that he raped her?

A. Yes, sir.

Q. Is that the words he used?

A. Yes, sir.

Q. Did he ever say, "I made her give me head"?

A. No, sir.

Q. He said rape?

(p. 24) A. Yes, sir.

Q. And then he said, I believe your terminology was - you gave a quote, and if I misquote you, it's because I was trying to write down - choked her until the breath was out of her, or words to that effect?

A. The exact quote is, "he choked her until he thought he had choked every last breath of air out of her."

Q. And he also mentioned torturing her prior to killing her?

A. Yes.

Q. And then he shot her in the head to make sure she was dead; is that correct?

A. Yes. Yes, sir.

Q. Okay. Now, when Tony apparently was interviewed by the Phoenix authorities in August of '84, a year before you were then questioned by the Phoenix authorities, did you discuss with Tony at that time what he was doing out of town to talk to the Phoenix people?

A. No, I did not.

Q. Okay. In fact, Mrs. Sarivola, isn't it a fact that you - you recall my interview of you on October 22nd, 1985, in Houston, Texas - Dallas?

A. Dallas.

(p. 25) Q. Dallas, Texas?

A. Yes, sir.

Q. Okay. Do you recall telling me at that time that that was the first time that you knew that Tony was a paid, confidential informant for the FBI?

A. Yes, sir.

Q. And so from whenever he went to work for the FBI until October of this year, just a month and a half ago, you didn't even know he was giving information to the FBI; is that correct?

A. That is correct.

Q. Well, did you get into the program in October of '84?

A. No.

Q. When did you get into the program?

A. March of '85.

Q. Okay. Well, were you and Tony still living together?

A. When, sir, at what time?

Q. Between September of '84 and March of '85, did you and Tony reside together?

A. September, October, and November of 1984, no, because Tony was on the program at that time. They were waiting for my papers to come through. Tony then came back to New York, and yes, we did reside together.

(p. 26) That's why I had asked you at what time.

Q. From December to March?

A. Right, until we got back on the program, yes, sir.

Q. And then you got back into the program or you finally were accepted?

A. No, then we both got back and we both had to be reaccepted.

Q. And - okay. And that was March of '85?

A. Yes, sir.

* * *

(p. 28) Q. Okay. Now, you say that you received a call from Tony to you where this - where you refreshed his recollection about your overhearing - or your conversation with Red; is that correct?

A. Yes, sir.

Q. And where did that call come from?

A. Tony had been in Lexington, Kentucky, on a meeting.

Q. Okay. Now, when he talked to you on the phone, what did he tell you that all of a sudden you can (p. 29) recall this conversation that you had had two years prior?

A. Okay. When Tony goes on meetings, I usually don't ask him prior to his leaving who the meetings are with. In fact, he usually did not know - doesn't know.

> When he called me from the meeting, I had asked him who was there. And he told me the guys from

Phoenix having to do with Red. And that's when I said to him, "Hey, do you remember the conversation that Red and I had had on that Pennsylvania drive?"

Q. And he said, "Oh, yeah, I remember that now;" is that correct, or words to that effect?

A. No. Well, he had said that he had forgotten about it, yes.

Q. And then what did he say to you?

A. He had Charlie Bernardo with him. That's Walt Ticano's partner. He had asked me if it would be okay if he told Mr. Scull about the conversation because he didn't know if I would want to get involved or if he would want me to get involved.

Q. Okay.

A. And I had told him, "Yes, by all means, tell Mr. Scull."

* * *

(p. 31) Q. Right. After this telephone conversation that you had with Tony in June of '85, up until you then talked with K. C. and Officer Jones in August of '85, did you and Tony discuss Red?

A. Did we discuss Red?

Q. Uh-huh.

A. No, sir, we didn't.

Q. Did you discuss the conversation that you had had with Red?

A. No, we did not.

Q. When Tony got back to wherever you were, did he say anything about his conversations with Mr. Scull or Mr. Jones or any other representative of Phoenix Police Department - I'm sorry, Mesa Police Department, or anything?

A. The only thing he said was that we shouldn't discuss it because everybody would want to see what I could remember myself.

Q. Okay. And, of course, because he told you that, the two of you just didn't talk about it?

(p. 32) A. I cannot say that it never came up. I'm sure I passed remarks. We never sat down and just had a conversation about it.

Q. By the way, being in this Protected Witness Program is very important for Tony, isn't it?

A. I consider it to be.

Q. Excuse me?

A. I consider it to be.

Q. Okay. And, of course, part of the agreement with the government is, if they find out that he lies to them about any investigation, the deal is withdrawn; is that correct?

A. Yes, sir.

* * *

(p. 46) MARK JONES,

called as a witness herein, having been previously duly sworn, was examined and testified as follows:

* * *

(p. 68) RECROSS-EXAMINATION

BY MR. KOOPMAN:

* * *

(p. 69) Q. Did you ever receive any information from the FBI, either through written or oral reports, prior to your interview of Mr. Sarivola in August of '85 - '84, in which the words rape, or give head, or torture, or strangulation, or choked were used?

A. No, sir, I did not.

Q. In August of 1984 - do you have that report?

A. Yes, sir. I'm at that report now.

Q. Okay. Is that a true and correct report?

A. Yes, sir, it is.

Q. In fact, as I recall, early on in my original cross-examination of you, we made a determination that you tried to write your reports as accurately and as truthfully as possible; is that correct?

A. Yes, sir, that's correct.

Q. All right. Now, do you recall in August of '84 when you interviewed Sarivola, talking to him about his prior police experience?

A. Yes, sir, I do.

Q. And do you recall or -- you have your report in front of you; is that correct?

A. Yes, sir, I do.

(p. 70) Q. I'd like for you to turn to page 6 of that report.

A. Yes, sir. I'm at page 6.

Q. Okay. Well, you know what part I'm going to go to, don't you?

A. Yes, sir, I do.

Q. All right. In your report, does it say at one point "had served as a police officer with the Seagate Harbor Police, 3600 Surf Avenue, Brooklyn, New York, Sarivola said or stated that he was in the service of that police department for approximately four years and during that time had received 15 meritorious awards." Is that in your report?

A. Yes, sir, it is.

Q. And that's -- your reports are true and accurate recollections of your interview; is that correct?

A. That's correct.

Q. Okay. Now, in that particular interview, if you would just go through it, did Mr. Sarivola in August of '84, say to you that Jeneane Hunt or the little girl had been raped by Fulminante prior to his killing her?

A. No, sir, he did not.

Q. Did he say to you in August of '84 that Fulminante had said that he had forced the little girl to (p. 71) give him head before he killed her?

A. No, sir, he did not.

Q. Did he, in August of '84, indicate to you that Mr. Fulminante had said that he had choked or strangled her prior to killing her?

A. No, sir, he did not.

Q. Did he, did Sarivola in 1984, indicate to you that the little girl had been tortured or made to beg for her life before she was killed?

A. No, sir, he did not.

* * *

(p. 72) Q. Okay. And in there it says, "Sarivola stated that Fulminante did not mention the name brand of the gun but when he talked about changing the gun's barrel, he felt it had to be a Dan Wesson," is that correct, is that a correct statement?

A. Yes, sir, that is.

Q. Okay. Up toward the top of that page when you were talking to Sarivola, did he indicate to you at that point in time that he considered and that others at the prison considered Mr. Fulminante a liar and a storyteller?

A. Yes, sir.

* * *

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
)	
Plaintiff,)	
)	
vs.	)	CR-142821
)	
ORESTE C. FULMINANTE,)	
)	
Defendant.)	
_____)	

Phoenix, Arizona
December 16, 1985
10:36 o'clock p.m.

BEFORE: THE HONORABLE STEPHEN A. GERST,
JUDGE

Reporter's Transcript of Proceedings
Volume IX - Trial

* * *

(p. 47) THOMAS B. JARVIS,

called as a witness herein, having been first duly sworn,
was examined and testified as follows:

Direct Examination

BY MR. SCULL:

Q. Doctor, would you state your name and occupation for us, please?

A. My name is Thomas B. Jarvis. I'm a physician and I'm Deputy Chief Medical Examiner for Maricopa County.

* * *

(p. 54) Q. BY MR. SCULL: All right. I sorry to (p. 55) interrupt you, but I thought that might be a good time to put that in. Now, you made some other findings, I assume?

A. Those were the major findings. There were some minor things that should be mentioned. There was dried blood that streamed down over the right cheek apparently from the exit wound in front of the right ear in this direction (indicating).

There were some abrasions on the left forehead here that appeared to have occurred after death from lying on the ground. There was a ligature around the neck and it was tied but there was not any compression of the neck and I don't think it had anything to do with the death, but there it was. It doesn't have anything to do with the death because it was not tight. I don't know what it was there for.

And because apparently of combined effects of decomposition and animal activity, the right forearm and the right hand were absent and I don't know what happened to them.

* * *

(p. 59) Q. All right. Did you also have swabs from the body checked for spermatozoa and seminal fluid?

(p. 60) A. Yes, sir.

Q. And what were the results of those tests?

A. The sources of these swabs were the vagina and the mouth, and the pharynx and the rectum and they were all negative both for spermatozoa and seminal fluid.

Q. All right. Do you have any expert or medical opinion as to how long spermatozoa would live in the subject to an environment of say 48 hours in the desert?

A. I would like to say it this way, if I may, that the general experience in this area is so varied that it's very difficult to have an opinion as to how long sperm or seminal fluid will persist.

My own personal experience, which spans about 28 years, is that it's quite variable but that it's rare to find seminal fluid or sperm in a decomposing female body even when you suspect that it ought to be there. And I don't believe that the material persists very long. But, it's - that's a pretty speculative position I have taken and I would not want to take any stronger position than what I have just said.

* * *

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)	
)	
Plaintiff,)	
)	
vs.	)	CR-142821
)	
ORESTE C. FULMINANTE,)	
)	
Defendant.)	
_____)	

Phoenix, Arizona
December 17, 1986
10:45 o'clock a.m.

BEFORE: THE HONORABLE STEPHEN A. GERST,
JUDGE

Reporter's Transcript of Proceedings
Volume X - Trial

* * *

(p. 36) DAN BARKER,
called as a witness herein, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOOPMAN:

Q. Mr. Barker, will you please give your present occupation to the Jury?

A. As of yesterday, I'm the new constable for the Peoria Justice Court District.

Q. And prior to getting that job, where did you work, sir?

A. As an investigator for the County Attorney's office.

* * *

(p. 37) Q. Okay. And during the course of this investigation, were you assisting Mr. Scull in his investigation for preparation for trial in this case?

A. Yes, I did.

Q. And as part of that function, sir, did you have occasion to interview Mr. Anthony Sarivola on or about June 17th, 1985?

A. I believe the date is wrong, unless I'm mistaken.

Q. Well, do you have your copy of that report?

A. Yes, if I may.

Q. Sure.

A. No, the interview took place May 20th and 21st, 1985.

Q. Okay. And the date, June 17th was the date that you typed this up?

(p. 38) A. Yes.

Q. Or had it typed up?

A. Yes.

Q. Okay. Did you take notes of that interview?

A. Yes.

Q. Was that the first time that you interviewed Mr. Sarivola?

A. Yes.

Q. Now, I'd like you to turn to page 3, starting with the bottom sentence, the last sentence.

A. The last complete sentence?

Q. No, where it says "Sarivola does not."

A. Okay.

Q. Would you please read that entire sentence to the Court.

A. "Sarivola does not recall Red mentioning hitting the girl, binding her, or sexually molesting her prior to killing her."

Q. And that was in May of '85?

A. Yes.

Q. Okay. When he said "Red" who was he referring to?

A. The Defendant, Oreste Fulminante.

Q. All right. How did this particular information come out? Did you ask him specifically, "Did (p. 39) Red tell you he hit the girl prior to killing her," or was it general conversation?

A. I think it was general conversation. I don't recall whether myself or Mr. Scull brought this up and asked him the questions.

Q. Okay. But, you do specifically recall him saying Red did not mention hitting the girl?

A. As I have written there, he could not recall Red saying any of these things as against Red did not say these things.

* * *

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE
COUNTY OF MARICOPA

STATE OF ARIZONA,)	
)	
Plaintiff,	)	CR 142821
)	
vs.	)	SPECIAL
	)	VERDICT
ORESTE CHARLES FULMINANTE,)	
JR.,)	
)	
Defendant.)	

* * *

There were additional statements made by the Defendant to the Sarivolas wherein he stated that he made the child commit an act of oral sex on him and that he raped her.

The Court finds such statements were, in fact, made by the Defendant, however, there is no independent corroboration of the statements relating to sexual misconduct from any of the findings of the medical examiner or the or the physical evidence produced at trial.

The Court finds that the possibility of sexual misconduct exists but the evidence is inconclusive and not beyond a reasonable doubt.

The statements attributed to the Defendant regarding acts of sexual misconduct are not, therefore, being considered on the issue of cruelty. Such statements are, however, being considered on the issue of whether the crime was committed with a heinous and depraved state of mind.

* * *

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

STATE OF ARIZONA,	)	NO.
	)	CR-86-0053-AP
Appellee,)	
-vs-	)	MARICOPA
	)	COUNTY
ORESTE C. FULMINANTE,)	SUPERIOR
)	COURT
Appellant.)	NO. CR-142821

APPELLEE'S ANSWERING BRIEF

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STATEMENT OF THE CASE

* * *

Although the police suspected appellant of murdering Jeneane, they did not have enough evidence to charge him with that offense. Detective Jones did find out during his investigation of the case that appellant had a 1971 conviction for passing bad checks in the state of New Jersey. Detective Jones and his fellow detectives passed

that information on to the federal authorities in the Alcohol, Tobacco and Firearms Bureau. (R.T. of Dec. 10, 1985, at 45-46).

In 1983, appellant was convicted of possession of a firearm by a felon. Appellant was sent to Raybrook Federal Correctional Institution in the state of New York to serve a prison term for that offense. (R.T. of Dec. 10, 1985, at 73.) While in prison, appellant became friendly with another inmate, Anthony Sarivola. Sarivola had been involved with organized crime for a number of years, and was serving a 60-day sentence for extortion. (R.T. of Dec. 11, 1985, at 8-11.) Prior to going to Raybrook, Sarivola had become a paid informant for the Federal Bureau of Investigation. While in Raybrook, he masqueraded as an organized crime figure. (*Id.* at 12.)

After Sarivola and appellant became friends, Sarivola heard a rumor that appellant was suspected of killing a child in Arizona. (*Id.* at 14-15). He asked appellant about the rumor, and appellant denied that it was true. (*Id.* at 15-16.) Sarivola told his contact in the F.B.I., Agent Walter Ticano, about the rumor. Agent Ticano told Sarivola to find out more about it. (*Id.* at 16.) Appellant had been receiving tough treatment from the other inmates, so Sarivola told appellant that he had to tell him the truth in order for Sarivola to give him any help. (*Id.* at 17-18.) Appellant then admitted to Sarivola that he had taken his stepdaughter, Jeneane, out to the desert on his motorcycle, and that he then shot her two times in the head with his .357 revolver. Appellant said he did it because Jeneane was a little bitch who was always in his way with his wife. Appellant told Sarivola that he choked Jeneane and made her beg a little before shooting her. He also claimed

he forced Jeneane to perform oral sex on him. (*Id.* at 18-20.) Appellant told Sarivola that he hid the murder weapon somewhere in a pile of rocks at the murder scene. (*Id.* at 20-22.)

* * *

ARGUMENTS

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT A GOVERNMENT AGENT DID NOT VIOLATE APPELLANT'S FIFTH AMENDMENT RIGHTS WHEN HE INTERROGATED APPELLANT.

* * *

In the present case, appellant was incarcerated in Raybrook Prison in the State of New York on a federal weapons charge. Anthony Sarivola, a paid confidential informant for the Federal Bureau of Investigation, was incarcerated in Raybrook at the same time appellant was there. Sarivola heard rumors that appellant had killed his stepdaughter in Arizona. Appellant denied that the rumors were true. Sarivola passed the rumors on to Agent Walter Ticano of the F.B.I. Agent Ticano told Sarivola that, since it was just a rumor, Sarivola would have to find out more about it before Agent Ticano could act on it. Sarivola recontacted appellant and asked him again if the rumors were true. He told appellant that he might be in a position to help protect appellant from physical recriminations in prison, but that appellant must tell him the truth. Appellant then told Sarivola that he had killed his stepdaughter in Arizona. He recounted in detail the

circumstances of the killing. (Response to Motion to Suppress, filed Oct. 30, 1985, at 1-2.)

* * *

No. 89-839

In The
Supreme Court of the United States

October Term, 1989

STATE OF ARIZONA,

Petitioner,

-vs-

ORESTE C. FULMINANTE,

Respondent.

On Writ Of Certiorari To The
Arizona Supreme Court

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Arizona Supreme Court err in failing to apply the totality of circumstances test in determining whether Fulminante's confession to an inmate informant was made voluntarily, and did the court err in holding that admission in evidence of Fulminante's confession violated his right to due process under the Fifth and Fourteenth Amendments of the United States Constitution on the ground that the confession was coerced by the inmate informant's implied promise to protect Fulminante from other inmates who were subjecting him to rough treatment, where Fulminante never expressed any fear of the other inmates and never sought the inmate informant's protection?

2. Can the erroneous admission of an involuntary confession be subject to a harmless-error analysis in a case where there is overwhelming evidence of guilt, including a second voluntary confession, and where there has been no especially egregious misconduct by law enforcement officials?

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OPINIONS BELOW

The Arizona Supreme Court's opinion holding that Fulminante's confession to an inmate informant was involuntary, but that its admission was harmless error beyond a reasonable doubt, is reported at 161 Ariz. 237, 778 P.2d 602 (1988).

The Arizona Supreme Court's supplemental opinion holding that federal constitutional law precluded it from finding admission of Fulminante's involuntary confession to an inmate informant to be harmless error is reported at 161 Ariz. 261, 778 P.2d 626 (1989).

STATEMENT OF JURISDICTION

Arizona asks this Court to review the opinions of the Arizona Supreme Court that were entered on June 16, 1988, and July 11, 1989. The Arizona Supreme Court denied the state's motion for reconsideration on September 19, 1989. The state sought a writ of certiorari on November 17, 1989. This Court granted the petition on March 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

No person . . . shall be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty, or property, without due process of law; . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

[N]o state . . . shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

A. The Murder of Jeneane Hunt.

In the early morning hours of September 16, 1982, Richard Lence discovered the mutilated, partially decomposed body of a young girl in the desert area outside Mesa, Arizona. [R.T. of Dec. 16, 1985 (Trial) Vol. 9 at 4-5.] The girl's jeans were unzipped, and had been pulled down over her buttocks. A cloth ligature, or garment rag, was tied around her neck. [R.T. of Dec. 9, 1985 (Trial) Vol. 4 at 20-21, 24-26.]

An autopsy of the girl's body revealed that she died after being shot twice in the head at close range by a large caliber weapon, such as a .357 revolver. [R.T. of Dec. 16, 1985 (Trial) Vol. 9 at 48-59, 70.] Although the ligature around the girl's neck did not contribute to her death, it could have been used to effect non-fatal choking prior to her death. [J.A. at 187; R.T. of Dec. 16, 1985 (Trial) Vol. 9 at 63.]

The body was identified as that of Jeneane Hunt, Fulminante's 11-year-old stepdaughter. [R.T. of Dec. 9,

1985 (Trial) Vol. 4 at 58.] Fulminante had been taking care of Jeneane from September 7-14, while his wife, Mary, was in the hospital for surgery. [R.T. of Dec. 17, 1985 (Trial) Vol. 10 at 15.] Fulminante had telephoned the Mesa Police Department at 1:49 a.m. on September 14 to report that Jeneane was missing. [R.T. of Dec. 9, 1985 (Trial) Vol. 4 at 39.] When Mary returned from the hospital on September 14, she found that Fulminante's .357 Dan Wesson revolver was missing from their bedroom. [R.T. of Dec. 17, 1985 (Trial) Vol. 10 at 25.]

After the discovery of Jeneane's body, Mary told Mesa police that Fulminante and Jeneane had not gotten along with each other, and that there had been a lot of fighting in the Fulminante home. (*Id.* at 14.) On one occasion, Fulminante spanked Jeneane so hard with a "spanking board" that he bruised her buttocks. The police investigated the incident and questioned Fulminante about it. Fulminante later told Mary that he would "get even" with Jeneane, and threatened to "kill her fucking ass." (*Id.* at 19-21.)

During their investigation, the police found out that Fulminante traded a rifle for an extra barrel for his .357 Dan Wesson revolver the day before Jeneane's disappearance. [R.T. of Dec. 16, 1985 (Trial) Vol. 9 at 42-43.] Fulminante had previously told Mary that a person who wanted to kill someone could switch barrels on a .357 Dan Wesson. He described it as a good way to commit a crime "because then the ballistics would be hard to make and it's an easy switch." [R.T. of Dec. 17, 1985 (Trial) Vol. 10 at 24.] Based on Fulminante's actions in purchasing the interchangeable barrel for his revolver, and his numerous inconsistent statements to the police regarding Jeneane's

disappearance, Fulminante became a suspect in Jeneane's murder. [R.T. of Dec. 10, 1985 (Trial) Vol. 5 at 47, 60-62.]

B. Fulminante's Confessions.

In mid-September of 1983, Anthony Sarivola was an inmate at Raybrook Federal Correctional Institution in New York. (J.A. at 77.) Sarivola had been involved with organized crime for a number of years, and had been sentenced to 60 days in Raybrook following a conviction for extortion. (J.A. at 75, 77.)

Before he went to Raybrook, Sarivola arranged a meeting with Agent Walter Ticano of the Federal Bureau of Investigation. As a result of that meeting, Sarivola became a paid informant for the F.B.I. in matters relating to organized crime in the Brooklyn, New York City area. (J.A. at 76.) While serving his prison term at Raybrook, Sarivola masqueraded as an organized crime figure. (J.A. at 78.)

On his eighth day at Raybrook, Sarivola met Fulminante, who was serving time in Raybrook for possession of a firearm by a felon. [J.A. at 77-78; R.T. of Dec. 10, 1985 (Trial) Vol. 5 at 73.] Sarivola and Fulminante became friends while they were in prison together. Because they were only locked down at night, they were free to walk around the prison and talk during the day. (J.A. at 77, 80.)

After he met Fulminante, Sarivola heard a rumor that Fulminante was being investigated for killing his stepdaughter in Arizona. (J.A. at 80-81.) Sarivola and Fulminante had several conversations about Jeneane's death. At first, Fulminante denied to Sarivola that he had killed

Jeneane. He said that she had been killed by bikers looking for drugs. On another occasion, he said that he did not know what had happened. (J.A. at 81.) Sarivola reported the rumors to Agent Ticano, who indicated he should find out more about it. (J.A. at 81-82.)

Sarivola's opportunity to find out more about Jeneane's murder arose one evening when the two men were walking around the prison track together. Fulminante had been receiving "tough treatment and whatnot" from the other inmates, so Sarivola told Fulminante that he had to tell him the truth about Jeneane's death in order for Sarivola to give him any help. (J.A. at 82-83.) Fulminante then admitted to Sarivola that he took Jeneane out to the desert on his motorcycle, and that he killed her by shooting her two times in the head with his .357 revolver. (J.A. at 83-84.) Fulminante said he did it because Jeneane "was a little bitch and she was always in his way with his wife." (J.A. at 83.) Fulminante told Sarivola that he choked Jeneane and made her beg a little before shooting her. He also said that he forced Jeneane to perform oral sex on him. (J.A. at 84-85.)

When Fulminante was released from prison in May of 1984, Sarivola and his fiancée, Donna,¹ picked up Fulminante at the bus terminal. (J.A. at 91, 166.) Donna Sarivola asked Fulminante if he had any relatives he wanted to go see after getting out of prison. Fulminante told Donna Sarivola that he could not go back to Arizona

¹ Donna and Anthony Sarivola were married in June of 1984. (J.A. at 111.) For purposes of clarification, Anthony Sarivola will be referred to as "Sarivola," and his wife will be referred to as "Donna Sarivola" in petitioner's brief.

because he had killed a little girl there. (J.A. at 167-68.) Fulminante boasted that one day he was going to make it his business to go back to Arizona so that he could "piss on her grave." (J.A. at 168.) Fulminante told Donna Sarivola that he had taken the little girl out into the desert where he raped, beat, and choked her before shooting her in the head. (J.A. at 168.) Fulminante also said he made the little girl beg before he shot her. Fulminante referred to the victim as "the fucking little kid that had got in the way of him and his wife." (J.A. at 169.)

C. Fulminante's Murder Trial.

Fulminante was charged by indictment filed September 4, 1984, with the first-degree murder of Jeneane Hunt. (J.A. at 2.) Prior to trial, Fulminante filed a motion to suppress the confession he made to Sarivola while in prison, and the confession he made to Donna Sarivola following his release from prison. (J.A. at 3.) Fulminante claimed that his confession to Sarivola was not voluntarily made because it was coerced by Sarivola's promise to protect him from other inmates.² (J.A. at 7-8.) Fulminante sought to suppress his confession to Donna Sarivola on the ground that it was the "fruit"³ of Sarivola's previous violation of his constitutional rights. (J.A. at 6-7.)

² Fulminante also claimed that Sarivola violated his Fifth Amendment rights by subjecting him to custodial interrogation without first advising him of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966).

³ See *Wong Sun v. United States*, 371 U.S. 471 (1963).

Pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964), the trial court conducted a hearing outside the presence of the jury on Fulminante's motion to suppress his confessions. (J.A. at 30-42.) Neither party presented any evidence at the voluntariness/suppression hearing. Instead, for purposes of arguing the voluntariness issue, Fulminante adopted the recitation of facts set forth by the state in its response to the motion to suppress. (J.A. at 10, 30-31.)

After listening to lengthy arguments by both the prosecutor and defense counsel, the trial court denied Fulminante's motion to suppress his confessions to Sarivola and Donna Sarivola. (J.A. at 43.) The trial court made a specific finding that Fulminante's confessions were voluntary. (J.A. at 63.) The state subsequently introduced both confessions in evidence in its case-in-chief. (J.A. at 83-85, 168-69.)

Fulminante was convicted of first-degree murder. [R.T. of Dec. 19, 1985 (Trial) Vol. 12 at 3.] The court found that the murder was especially heinous, cruel, and depraved, and imposed the death penalty. [R.T. of Feb. 11, 1986 (Sentencing) at 8-17.]

D. Fulminante's Appeal.

Fulminante's appeal to the Arizona Supreme Court was automatic. Rule 31.2(b), Ariz. R. Crim. P. Initially, that court affirmed Fulminante's conviction. *State v. Fulminante*, 161 Ariz. 237, 778 P.2d 602 (1988). The court agreed with Fulminante that his confession to Sarivola should have been suppressed because it was rendered involuntary by Sarivola's promise to protect Fulminante

from other inmates. 161 Ariz. at 244, 778 P.2d at 609. The court held, however, that the admission of the confession was harmless beyond a reasonable doubt because it was cumulative to his second confession to Donna Sarivola, which "established his guilt." 161 Ariz. at 245, 778 P.2d at 610. The court found that the physical evidence in the case corroborated the confession to Donna Sarivola. 161 Ariz. at 245-46, 778 P.2d at 610-11. The court specifically rejected Fulminante's claim that his confession to Donna Sarivola should have been suppressed based upon the "fruit of the poisonous tree" doctrine. 161 Ariz. at 246, 778 P.2d at 611.

Fulminante filed a timely motion for reconsideration, which the court granted. (Appendices to Petition for Writ of Certiorari at B-1.) The court then issued a supplemental opinion reversing Fulminante's conviction. 161 Ariz. at 261, 778 P.2d at 626. The Arizona Supreme Court reversed its previous determination that admission of Fulminante's coerced confession to Sarivola was harmless error, stating that federal constitutional law "compels us to conclude that the receipt of the original coerced confession may not be considered harmless error." 161 Ariz. at 262, 778 P.2d at 627.

Justice Cameron dissented from the majority opinion on the ground that "changes in the law now allow the harmless error doctrine to be applied to coerced but reliable confessions." 161 Ariz. at 263, 778 P.2d at 628.

Following denial of a timely motion for reconsideration, the state filed for a writ of certiorari on November 17, 1989. (Appendices to Petition for Writ of Certiorari at

D-1.) This Court granted the petition for writ of certiorari on March 26, 1990.

SUMMARY OF ARGUMENTS

In determining that Fulminante's confession to Sarivola was rendered involuntary by Sarivola's promise of protection, the Arizona Supreme Court misconstrued this Court's decision in *Bram v. United States*, 168 U.S. 532 (1897). The court misread *Bram* as requiring a simple "but for" analysis where a confession follows a promise. Although the court acknowledged that the proper test to be applied in determining voluntariness of a confession is the "totality of circumstances" test,⁴ it is evident that the court failed to apply the correct test, as it made no finding that Fulminante's will was overborne by Sarivola's promise of protection.

When the "totality of circumstances" test is applied to Fulminante's confession to Sarivola, it is apparent that the promise of protection did not overbear Fulminante's will and render his subsequent confession involuntary. Fulminante is a middle-aged hardened criminal, whose will could not be easily overborne. Although other inmates in the prison had been giving Fulminante a hard time because of the rumor that he was a child-killer, he never indicated to Sarivola that he was in fear of the other inmates. Further, Fulminante never asked Sarivola for protection, although he thought Sarivola still had connections with organized crime and would have been

⁴ *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)

able to protect him. The confession was the product of Fulminante's free will.

Even assuming, *arguendo*, that Fulminante's confession was coerced by Sarivola's promise of protection, reversal of his murder conviction was unwarranted. The erroneous admission of a coerced confession should not mandate reversal if it can be said, beyond a reasonable doubt, that the error was harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967). Although this Court has previously stated that admission of a coerced confession can never be harmless error, it is just the sort of evidentiary error that readily lends itself to a harmless-error analysis. See *Satterwhite v. Texas*, 486 U.S. 249, ___, 108 S. Ct. 1792, 1798 (1988).

Concerns about the reliability of coerced confessions and their effect on the jurors do not warrant exempting the erroneous admission of a coerced confession from a harmless-error analysis. Neither do concerns that admission of a coerced confession may have the appearance of denying a defendant his right to a fair trial. Further, application of a harmless-error analysis will not undermine efforts to deter unlawful government conduct.

Application of a harmless-error analysis to coerced confessions is consistent with the basic purpose of a criminal trial, which is to determine guilt or innocence. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Continued adherence to the rule requiring automatic reversal in a case where a coerced confession is erroneously admitted in evidence results in subverting the basic purpose of a criminal trial at a substantial cost to society. *United States v. Mechanik*, 475 U.S. 66, 72 (1986). In Fulminante's

case, the state is required to afford him a new trial, even though there was no egregious government misconduct and even though the Arizona Supreme Court determined, beyond a reasonable doubt, that admission of the coerced confession was harmless error.

ARGUMENTS

I

FULMINANTE'S CONFESSION TO AN INMATE INFORMANT WAS VOLUNTARY, AND ITS ADMISSION IN EVIDENCE DID NOT VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS.

The first question presented to this Court is whether the Arizona Supreme Court erred as a matter of federal constitutional law in determining that Fulminante's confession to Sarivola was involuntary. As this Court noted in *Miller v. Fenton*, 474 U.S. 104, 110 (1985):

Without exception, the Court's confession cases hold that the ultimate issue of "voluntariness" is a legal question requiring independent federal determination.

This Court makes an independent evaluation of a state court's determination of voluntariness based upon the undisputed facts of the case. *Stroble v. California*, 343 U.S. 181, 190 (1952).

A. When A Defendant Objects To The Admission Of His Confession, The Trial Court Is Required To Determine Its Voluntariness Based Upon The Totality Of Circumstances Test.

The Fifth Amendment prohibition against compelled testimony and the due process clause of the Fourteenth

Amendment both forbid the admission in evidence of a defendant's involuntary, or coerced, confession. *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Malloy v. Hogan*, 378 U.S. 1, 6-7 (1964). A defendant has a constitutional right to object to the admission of a confession that he claims is involuntary, and he is entitled to a "fair hearing and reliable determination on the issue of voluntariness" by the trial court prior to admission in evidence of his confession. *Jackson v. Denno*, 378 U.S. at 376-77. At the voluntariness hearing, the burden is on the state to prove, at least by a preponderance of the evidence, that the confession was voluntarily made. *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

Pursuant to *Schneckloth v. Bustamonte*, 412 U.S. at 225, in addressing the question whether a confession is voluntary, the court must determine if the confession is "the product of an essentially free and unconstrained choice by its maker." The confession must not be "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (per curiam) (brackets in original), quoting *Bram v. United States*, 168 U.S. at 542-43.

It has long been recognized that an involuntary confession may be exacted as a result of psychological as well as physical coercion. As noted in *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960):

A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion."

The ultimate question is whether the pressure, in whatever form, was sufficient to cause an accused's will to be overborne and his capacity for self-determination to be critically impaired. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

A court's determination regarding voluntariness must be reached in light of the "totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. at 226. A court may not find that a confession is involuntary unless it first finds the presence of "coercive police activity." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

Under Arizona procedures, the trial court determines issues regarding the voluntariness of a confession out of the presence of the jurors. A.R.S. § 13-3988(A). Once a defendant challenges the voluntariness of his confession, the state is required to prove, by a preponderance of the evidence, that the confession was freely and voluntarily made, and that it was not the result of physical or psychological coercion. *State v. Osbond*, 128 Ariz. 76, 78, 623 P.2d 1232, 1234, cert. denied, 454 U.S. 846 (1981). In determining the voluntariness of confessions, Arizona courts look to the totality of circumstances in deciding whether the will of a defendant has been overborne. *State v. Jordan*, 137 Ariz. 504, 506, 672 P.2d 169, 171 (1983). In order for a promise to render a confession involuntary, the defendant must have relied on the promise when confessing. *State v. Hall*, 120 Ariz. 454, 457, 586 P.2d 1266, 1269 (1978). An appellate court will not overturn the trial court's determination of voluntariness absent a finding of clear and manifest error. *State v. Hall*, 120 Ariz. at 456, 586

P.2d at 1268. In determining if the state carried its burden of proof regarding voluntariness, the appellate court examines the entire record. *State v. Thomas*, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986).

B. The Arizona Supreme Court Applied An Incorrect Test In Overruling The Trial Court's Determination Of Voluntariness.

Although the Arizona Supreme Court noted in its initial opinion that it was required to apply the "totality of circumstances" test in determining whether the trial court's finding of voluntariness was clear and manifest error, it ignored that requirement in addressing the voluntariness issue. The Arizona Supreme Court agreed with Fulminante that Sarivola's promise of protection was "extremely coercive" because the "obvious" inference from the promise was that Fulminante's life would be in jeopardy if he did not confess. 161 Ariz. at 243, 778 P.2d at 608. Instead of then determining whether Fulminante's will was overborne by Sarivola's promise of protection, the court merely applied a "but for" test and concluded that the promise rendered the confession involuntary. 161 Ariz. at 244, 778 P.2d at 609.

While the Arizona Supreme Court did not acknowledge that it was applying a "but for" test, rather than the "totality of circumstances" test, to assess the effect of Sarivola's promise upon Fulminante's confession, that is exactly what that court did. In concluding that Fulminante's confession was involuntary because it was made following Sarivola's promise of protection, the Arizona Supreme Court cited to this Court's decisions in *Malloy v.*

Hogan, 378 U.S. 1, and *Bram v. United States*, 168 U.S. 532, 161 Ariz. at 244, 778 P.2d at 609. The state maintains that the Arizona Supreme Court's action in applying a "but for" test to a promise made in the course of obtaining a confession was based upon its misreading of the *Bram* case.

The state acknowledges that *Bram* could easily be misread to have applied a simple "but for" test; that is to say, if the confession would not have been given but for the promise, then it must be excluded from evidence. 168 U.S. at 549. However, such a test would not take into account the narrower question of compulsion. If this was the holding in *Bram*, it was based upon the rationale that "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner." 168 U.S. at 543.

Bram, however, is not viewed as proscribing the admission of all promise-induced confessions.⁵ This Court has expressly recognized that "*Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel." *Brady v. United States*, 397 U.S. 742, 754 (1970) (emphasis added). If *Bram* did not hold this, then *Bram* cannot be read as foreclosing any inquiry into

⁵ *Green v. Scully*, 850 F.2d 894, 901-03 (2nd Cir.), cert. denied, 109 S. Ct. 374 (1988); *Miller v. Fenton*, 796 F.2d 598, 608-11 (3rd Cir.), cert. denied sub nom., *Miller v. Neubert*, 479 U.S. 989 (1986); *United States v. Shears*, 762 F.2d 397, 401-03 (4th Cir. 1985); *Jarrell v. Balkcom*, 735 F.2d 1242, 1250-51 (11th Cir. 1984), cert. denied, 471 U.S. 1103 (1985); *Rachlin v. United States*, 723 F.2d 1373, 1377-78 (8th Cir. 1983); *United States v. Ferrara*, 377 F.2d 16, 17-18 (2nd Cir.), cert. denied, 389 U.S. 908 (1967).

the question of compulsion when all that is shown is a "but for" relationship between a statement and a promise.

Further, this Court did not use a "but for" test in *Hutto v. Ross*, 429 U.S. 28, a case decided after this Court held in *Schneckloth v. Bustamonte*, 412 U.S. at 226, that the "totality of circumstances" test was the appropriate test. In its per curium decision in *Hutto*, this Court indicated that it does not matter that an accused confessed because of the promise, so long as the promise did not overbear his will. 429 U.S. at 30.

C. Application Of The Totality Of Circumstances Test To The Undisputed Facts Of This Case Demonstrates That The Trial Court's Determination Of Voluntariness Was Correct.

In its initial opinion, the Arizona Supreme Court held that the trial court did not abuse its discretion in ruling that Fulminante's confession was voluntarily made. This was because Fulminante did not provide the trial court with any evidence at the voluntariness hearing to support his claim that he was in danger, and that Sarivola used that fact to coerce a confession. The state maintains that the Arizona Supreme Court was correct in finding that the trial court did not err in its ruling. However, the Arizona Supreme Court was incorrect in its determination that the trial evidence established that Fulminante's confession was coerced. No evidence that Fulminante's life was in danger was presented at trial.

For the purpose of arguing the voluntariness issue, Fulminante's trial counsel adopted the facts set forth by the prosecutor in the state's response to the motion to suppress. (J.A. at 30-31.) Defense counsel made it clear that Fulminante was not "admitting that any confession was ever made to Sarivola or to his wife, Donna." (J.A. at 31.) During argument, neither defense counsel, nor the prosecutor,⁶ alluded to the fact that Fulminante had been receiving rough treatment from the other inmates prior to his confession to Sarivola. However, the trial court was made aware of that fact, as evidenced by an excerpt of Sarivola's defense interview that was attached to Fulminante's Reply to Response on Motion to Suppress. (J.A. at 20, 29.) Thus, although Fulminante did not present any "evidence" at the voluntariness hearing that he was in danger, and that Sarivola used that fact to coerce the confession, the trial court was made fully aware of all of the circumstances surrounding Fulminante's confession to Sarivola. The trial court found that the confession to Sarivola was not "the result of promises, threats, or coercion by the Government or any of its agents," and that it had been voluntarily made. (J.A. at 44, 63.) When the characteristics of the accused, the circumstances of the interrogation, and the conduct of law enforcement officials are taken into consideration, it is readily apparent that the trial court's determination of voluntariness was correct.

⁶ The prosecutor did refer during argument to various statements Sarivola allegedly made to Fulminante to the effect that other inmates might hurt Fulminante if they found out that he was a child-killer. (J.A. at 40-42.)

1. Characteristics of the accused.

There is nothing in Fulminante's character traits or background to suggest that he is a man whose will could be easily overborne. At the time of the confession, he was a mature man of average or low average intelligence whose formal education ended when he dropped out of school during the fourth grade. (Adult Probation Department-Presentence Investigation, filed Feb. 4, 1986, Record on Appeal, Photostated Instruments at 88i, 88o.) Although he lacked much in the way of formal education, Fulminante was well-schooled in the intricacies of the criminal justice system. At the age of 44, he had six prior felony convictions, including a 1965 conviction in New Jersey for impairing the morals of a child. (*Id.* at 88, 88h.) He had been imprisoned on three occasions as a result of his felony convictions. (*Id.* at 88.) When he met Sarivola, Fulminante was already a hardened criminal who knew how to take care of himself while in prison.

2. Circumstances of the Interrogation

There was nothing of a coercive nature in the circumstances in which Sarivola questioned Fulminante about Jeneane's death. Although Sarivola was an F.B.I. informant who questioned Fulminante while inside prison, Fulminante was not subjected to the inherently coercive atmosphere of a custodial interrogation.⁷ He was unaware that Sarivola was an inmate informant. The two men were on friendly terms, and Fulminante talked to Sarivola about Jeneane's death because he wanted to do

⁷ This Court recognized in *Miranda v. Arizona*, 384 U.S. at 458, "the compulsion inherent in custodial surroundings."

so, not because he was under any official compulsion to do so.

3. Conduct of Law Enforcement Officials

It is undisputed that Sarivola was not an agent of the Mesa Police Department, the agency that conducted the investigation of Jeneane's murder. The Mesa police were unaware of Sarivola's existence in 1983, and played no role in Sarivola's questioning of Fulminante. (J.A. at 11.) It is also undisputed that no federal officials were directly involved in Sarivola's attempts to obtain a confession from Fulminante. However, when Sarivola questioned Fulminante, he was acting on Agent Ticano's instructions to find out more about the rumor that Fulminante murdered his stepdaughter. (J.A. at 10.) Thus, the trial court, by implication, determined that Sarivola was a government agent. (J.A. 43-44). The Arizona Supreme Court made an explicit finding to that effect.⁸

Fulminante did not complain that Sarivola engaged in any especially reprehensible conduct in obtaining his confession. However, he argued at the voluntariness hearing, and in his appeal to the Arizona Supreme Court, that Sarivola's promise to protect him from other inmates was "extremely coercive" and compelled him to confess.

While Sarivola's promise of protection could be viewed as objectively coercive, Fulminante's will was not overborne by this promise. Such a promise could well have

⁸ In its opinion, the Arizona Supreme Court referred to the fact that Fulminante was questioned by a "government agent." 161 Ariz. at 242, 778 P.2d at 607.

been sufficient inducement to overbear the will of a young, weak, or fearful individual. As this Court noted in *Stein v. New York*, 346 U.S. 156, 185 (1953):

What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal.

Fulminante, however, was neither young, weak, nor fearful. He was a hardened criminal. Although Sarivola told Fulminante that the other inmates might hurt him if they found out he was a child killer, Fulminante never indicated to Sarivola that he was in fear of the other inmates. Further, he never asked Sarivola for protection, even though he thought Sarivola had ties to organized crime. (J.A. at 10.) In fact, the only concern Fulminante ever expressed to Sarivola was his concern that, when he was released from Raybrook, the Mesa police would continue in their attempts to connect him with Jeneane's murder. (J.A. at 87.)

In finding that the state failed to establish that Fulminante's confession was voluntary, the Arizona Supreme Court specifically stated that the fact that Fulminante never indicated that he feared the other inmates, and that he did not seek Sarivola's protection, was insufficient to establish the voluntariness of his confession. 161 Ariz. at 244, 778 P.2d at 609. The court failed to recognize that the preceding facts showed that Fulminante did not rely on Sarivola's promise of protection. Despite the requirement that when confessing a defendant must rely on a promise before it will render his confession involuntary, the Arizona Supreme Court made no finding that Fulminante relied on Sarivola's promise of protection. Indeed, the

court could not make such a finding because there is nothing in the record that would support it.

Thus, there is absolutely no indication that Fulminante confessed to Jeneane's murder because his will was overborne by Sarivola's promise of protection. Conversely, it appears that he simply chose to confide in Sarivola, a fellow inmate he had come to know and trust. The fact that he chose to confide in a man who later betrayed his confidence does not mean that his confession was involuntary. As Justice Brennan stated in his dissent in *Lopez v. United States*, 373 U.S. 427, 465 (1963):

The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.

Additionally, when determining the coercive effect of Sarivola's promise of protection, it should be noted that the promise had no bearing on the question whether Fulminante would be treated leniently in a prosecution for Jeneane's death. It was, instead, a promise to help with a collateral problem – the tough treatment Fulminante was receiving from other inmates. As such, it was clearly much less coercive than would have been a promise made by an officer of the Mesa Police Department to treat Fulminante leniently if he would confess to the murder of his stepdaughter. See *Miller v. Fenton*, 796 F.2d at 610.

Moreover, in the situation usually cited where police officers promise a suspect lenient treatment in exchange for a statement, they are really telling the suspect that

they know that he committed the crime he is being questioned about, and that the promised leniency will be forthcoming only if he confesses to that crime. Sarivola, on the other hand, did not condition his promise of help on Fulminante's confession to murder. He told Fulminante that he would help him if Fulminante told him the truth. Thus, Fulminante had to know that Sarivola would still help him, regardless of what he said, if Sarivola believed him. Sarivola's promise of protection was not so coercive that it had the effect of overbearing Fulminante's will and producing a confession that was not an "essentially free and unconstrained choice." *Schneckloth v. Bustamonte*, 412 U.S. at 425.

II. THERE ARE NO VALID REASONS TO EXEMPT THE ADMISSION OF A COERCED CONFESSION FROM A HARMLESS-ERROR ANALYSIS.

After initially affirming Fulminante's murder conviction on the ground that admission of his coerced confession was harmless error beyond a reasonable doubt, the Arizona Supreme Court reversed the conviction in its supplemental opinion, stating:

It is clear that federal constitutional law, as interpreted, pronounced, and applied by the United States Supreme Court and other federal courts compels us to conclude that the receipt of the original coerced confession may not be considered harmless error.

161 Ariz. at 262, 778 P.2d at 627. In support of its conclusion, the court relied on this Court's opinions in *Mincey v. Arizona*, 437 U.S. at 398, *Chapman v. California*, 386 U.S. at 23 n.8, *Jackson v. Denno*, 378 U.S. at 376, and *Payne v.*

Arkansas, 356 U.S. 560, 568 (1958). 161 Ariz. at 261, 778 P.2d at 626.

Prior to its decision in *Chapman*, this Court stated on numerous occasions that the erroneous admission in evidence of a coerced confession could never be harmless error. In 1967, this Court held in *Chapman* that not every constitutional error requires reversal of a defendant's conviction if it may be said that the error was harmless beyond a reasonable doubt. 386 U.S. at 24. Since its decision in *Chapman*, this Court has not had occasion to squarely address the question whether the erroneous admission of a coerced conviction requires reversal in a case where it can be said, beyond a reasonable doubt, that admission of the coerced confession was harmless error.⁹ If this Court agrees with the Arizona Supreme Court that Fulminante's confession to Sarivola was coerced, that question is squarely before the Court.

In *Chapman*, the Court indicated in dicta that the erroneous admission in evidence of a coerced confession

⁹ Although *Mincey v. Arizona*, 437 U.S. 385, was decided after *Chapman*, the question whether admission of a coerced confession could be subject to a harmless-error analysis was not an issue in that case. There were two issues before the Court in *Mincey* – whether evidence had been obtained by an unconstitutional search and seizure, and whether the confession was voluntary. After the Court found a Fourth Amendment violation, it found it "appropriate" to consider the voluntariness issue, apparently to give the trial court guidance at the retrial. 437 U.S. at 396. The Court then found that the confession was involuntary. While the Court failed to apply a harmless-error analysis to the involuntary confession, it is not clear that the Court would have refused to do so had it not found that reversal was required based upon the Fourth Amendment violation.

was not subject to a harmless-error analysis because, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23. The *Chapman* Court did not further explain why application of the harmless-error analysis would be inappropriate in a case where a coerced confession has been erroneously admitted in evidence. The state requests this Court to now consider and determine the question whether admission of a coerced confession may be subject to the *Chapman* harmless-error analysis.

A. Concerns Regarding The Reliability Of A Coerced Confession And The Effect It Has On The Jurors Do Not Warrant Exempting Admission Of A Coerced Confession From A Harmless-Error Analysis.

This Court has held that the erroneous admission in evidence of a coerced confession at a state criminal trial violates the due process clause of the Fourteenth Amendment and vitiates a defendant's conviction. *Chambers v. Florida*, 309 U.S. 227, 228 (1940); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936); *Payne v. Arkansas*, 356 U.S. at 561.

In *Stein v. New York*, 346 U.S. at 192, the Court set forth the following reasons for automatically reversing a conviction obtained after admission in evidence of a coerced confession:

[R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A beaten confession is a false foundation for any conviction

Apparently this Court was concerned with the possibility that a confession obtained by coercion was inherently unreliable. Undoubtedly, the truth of a confession obtained by physical mistreatment or the threat of physical harm is suspect. However, a confession obtained by police coercion in the form of trickery, deceit, or promises is not necessarily unreliable. If government coercion produces a confession that is actually untruthful, the state will not be able to show that the error in admitting it was harmless, as there would be no overwhelming evidence to establish guilt. Thus, the mere possibility that a coerced confession is unreliable should not exempt it from a harmless-error analysis.

In *Stein*, this Court was also concerned with the evidentiary effect of a confession. 346 U.S. at 192. The introduction in evidence of a confession, coerced or not, may affect the jurors. However, other forms of inadmissible evidence may also affect the jurors. This possibility does not preclude a harmless-error analysis for other types of inadmissible evidence, and should not make the erroneous admission of a coerced confession immune from a harmless-error analysis. This Court stated in *Holloway v. Arkansas*, 435 U.S. 475 (1978):

In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury.

435 U.S. at 490 (citations omitted); accord, *Satterwhite v. Texas*, 486 U.S. at ___, 108 S. Ct. at 1798 (permitting harmless-error analysis "where the evil caused by a Sixth

Amendment violation is limited to the erroneous admission of particular evidence").

In *Milton v. Wainwright*, 407 U.S. 371, 372 (1972),¹⁰ this Court held that the erroneous admission of a confession obtained in violation of a defendant's Sixth Amendment right to counsel is subject to a harmless-error analysis. This Court has also held that the erroneous admission of a non-testifying co-defendant's confession in violation of *Bruton v. United States*, 391 U.S. 123 (1968), is not immune from a harmless-error analysis. *Harrington v. California*, 395 U.S. 250, 254 (1969). Because admission of such confessions would arguably have the same effect on the jurors as the admission of a coerced confession, the concern with its evidentiary effect does not justify exempting a coerced confession from a harmless-error analysis.

¹⁰ Because the defendant in *Milton* also challenged his confession on the ground that it was involuntary, the following circuit courts and state courts have held that allegedly involuntary confessions are not immune from a harmless-error analysis: *United States v. Carter*, 804 F.2d 487 (8th Cir. 1986); *United States v. Murphy*, 763 F.2d 202 (6th Cir. 1985), cert. denied sub nom., *Stauffer v. United States*, 474 U.S. 1063 (1986); *Harrison v. Owen*, 682 F.2d 138 (7th Cir. 1982); *State v. Childs*, 430 N.W.2d 353 (Wis. App. 1988), cert. denied, 109 S. Ct. 1154 (1989); *State v. Dean*, 363 S.E.2d 467 (W.Va. 1987); *Hinshaw v. State*, 398 So. 2d 762 (Ala. 1981).

B. Concerns That The Erroneous Admission Of A Coerced Confession May Have The Appearance Of Denying A Defendant His Right To A Fair Trial Do Not Warrant Exempting A Coerced Confession From A Harmless-Error Analysis.

The admission of a coerced confession may have the appearance of denying a defendant his fundamental right to a fair trial. The mere appearance that a defendant has been denied his right to a fair trial does not justify exempting coerced confessions from a harmless-error analysis. If the mere appearance of unfairness is a valid reason for exempting evidence obtained in violation of a defendant's constitutional rights from a harmless-error analysis, then admission of other illegally-obtained evidence would be exempt from a harmless-error analysis. However, this Court has held that the erroneous admission of evidence seized in violation of the Fourth Amendment, *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968), and of confessions obtained in violation of the Sixth Amendment are, in fact, subject to a harmless-error analysis. *Milton v. Wainwright*, 407 U.S. at 372.

As this Court stated in *Stein v. New York*, 346 U.S. at 192:

Coerced confessions are not more stained with illegality than other evidence obtained in violation of the law.

That being the case, the mere appearance that a defendant has been denied a fair trial because his coerced confession has been introduced in evidence against him

does not warrant refusing to apply a harmless-error analysis. Where the state can establish that a defendant did have a fair trial, and that the coerced confession did not contribute to the verdict of guilt, the conviction should stand.

C. Application Of A Harmless-Error Analysis To The Erroneous Admission Of A Coerced Confession Is Consistent With The Central Purpose Of A Criminal Trial And Will Not Undermine The Deterrent Effect Of Exclusionary Rules.

This Court stated in *Delaware v. Van Arsdall*:

The harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

475 U.S. at 681 (citations omitted). The *Van Arsdall* Court recognized that there are some constitutional errors, such as the denial of the right to counsel and the denial of the right to an impartial trier-of-fact, that are so fundamental and pervasive that they mandate reversal regardless of the facts or circumstances of the case. 475 U.S. at 681-82; accord, *Rose v. Clark*, 478 U.S. 570, 579 (1986).¹¹

¹¹ The Court did note in *Rose v. Clark*, 478 U.S. at 578, n. 6, that the *Chapman* Court cited use of a coerced confession as an error that could never be harmless because it "aborted the basic trial process."

Clearly, the erroneous admission of a coerced confession is a serious violation of the Fifth and Fourteenth Amendments. However, it is not a violation that can be said to so infect the entire trial that it should automatically vitiate a conviction obtained after an otherwise fair trial. Application of the harmless-error analysis to the erroneous admission of a coerced confession comports with the central purpose of a criminal trial.

Although exclusionary rules keep reliable and relevant evidence from the jurors and deflect a criminal trial from its central purpose,¹² the reason for excluding coerced confessions is to curb police conduct that is "revolting to the sense of justice," *Miller v. Fenton*, 474 U.S. at 109 (quoting *Brown v. Mississippi*, 297 U.S. at 286); and "to substantially deter future violations of the Constitution," *Colorado v. Connelly*, 479 U.S. at 167. The preceding purposes for excluding coerced confessions will not be undermined if this Court holds that the erroneous admission of a coerced confession is subject to a harmless-error analysis.

D. The Facts And Circumstances Of Fulminante's Case Demonstrate Why The Harmless-Error Analysis Should Be Applied To The Erroneous Admission Of Coerced Confessions.

Turning to the facts and circumstances of the present case, it is clear that any concern regarding the reliability

¹² This Court has noted that the prohibition against admission of a coerced confession keeps "reliable and probative evidence" from a jury. *Michigan v. Harvey*, ___ U.S. ___, 110 S. Ct. 1176, 1181 (1990). See *Colorado v. Connelly*, 479 U.S. at 166.

of Fulminante's confession to Sarivola is unwarranted. Fulminante's second, and undeniably voluntary, confession to Donna Sarivola demonstrates the reliability of the confession to Sarivola. Any concern whether admission of Fulminante's coerced confession to Sarivola had an undue effect on the jurors is also unwarranted. Since evidence of Fulminante's second confession to Donna Sarivola was introduced in evidence, his first confession was cumulative evidence.

It cannot be said that introduction of Fulminante's first confession had the appearance of denying him his right to a fair trial. This was a situation where the question of coercion was extremely close. This is evidenced by the fact that the Arizona Supreme Court found that the trial court did not abuse its discretion in denying Fulminante's motion to suppress his confession to Sarivola. After reviewing the trial record, however, the Arizona Supreme Court found that the confession was coerced by Sarivola's promise of protection. It appears that the court's finding of involuntariness was based upon the state's failure to prove that the promise of protection did not coerce the confession, as Fulminante never testified that he confessed in reliance upon Sarivola's promise of protection. In any event, this was not a situation where a confession has been wrung from a defendant by government conduct that shocks the conscience.

Refusing to apply a harmless-error analysis in a case such as this is not necessary in order to deter any egregious police misconduct, as there was none. Neither Agent Ticano of the F.B.I. nor any member of the Mesa Police Department instructed Sarivola to use coercive tactics to obtain a confession from Fulminante. Sarivola

was not placed in prison for the purpose of obtaining incriminating statements from Fulminante. He was in Raybrook for the same reason Fulminante was there - both had been convicted of federal offenses. Sarivola and Fulminante met by chance. Further, although Sarivola's promise of protection was objectively coercive, it does not rise to the level of conduct that has been condemned by this Court on the basis that it is revolting or shocking to the conscience.

The central purpose of Fulminante's trial was to determine his guilt or innocence of the murder of his step-daughter. In its initial opinion, the Arizona Supreme Court applied a harmless-error analysis to the erroneous admission of Fulminante's coerced confession to Sarivola. The court determined that, under *Chapman* or any other harmless-error test, admission of the coerced confession was harmless error beyond a reasonable doubt. Requiring automatic reversal of a conviction where erroneously-admitted evidence has not had any effect whatsoever on the jury's determination of guilt does not comport with the central purpose of a criminal trial.

Even if there are a number of valid reasons that would support this Court's continued adherence to its previously-expressed dicta that admission of a coerced confession is not subject to a harmless-error analysis, those reasons should be reexamined. As this Court stated in *United States v. Mechanik*:

The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken

place; victims may be asked to relive their disturbing experiences. The "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution," and thereby "cost society the right to punish admitted offenders." Even if a defendant is convicted in a second trial, the intervening delay may compromise society's "interest in the prompt administration of justice," and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

475 U.S. at 72 (citations omitted). Although the error at issue in *Mechanik* was not an error of constitutional dimension, the costs to society are the same whether the error is constitutional or non-constitutional.

CONCLUSION

Arizona requests this Court to reverse the supplemental opinion of the Arizona Supreme Court, in which that court held that Fulminante's confession was coerced and that the court was precluded by federal constitutional law from applying a harmless-error analysis to its admission.

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QUESTIONS PRESENTED FOR REVIEW

1. Was Fulminante's confession coerced when a government agent threatened that Fulminante would be protected from impending inmate violence only if he renounced his denials and confessed?
2. Whether the admission of a coerced confession can be harmless error?

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STANDARD OF REVIEW

1. Voluntariness of a confession is a legal question requiring an independent determination by this Court. This issue is subject to plenary review. *Mincey v. Arizona*, 437 U.S. 385, 389 (1978).

2. In determining admissibility of a confession, the burden is on the state to prove, at least by a preponderance of the evidence, that the confession was voluntarily made. *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

STATEMENT OF THE CASE

I. FBI Agent Ticano Directed Informant Sarivola To Obtain Incriminating Statements From Fulminante Even Though He Knew Sarivola Made His Living Using Violence.

A. The FBI Employed Sarivola Under A Contingent Fee Agreement.

In September, 1982, Agent Walter Ticano of the Federal Bureau of Investigation (FBI) was responsible for the arrest of Anthony Sarivola for extortion. The arrest resulted from Sarivola's "shylarking" in New York City for the Columbo crime family.¹ The Columbo family loaned money at exorbitant interest rates and Sarivola used violence to obtain repayment. J.A. 75, 78-79, 104-105, 134, 155-158.

Sarivola had done "shylarking" even while he was a salaried police officer. He gave up "full employment" as a policeman to devote more time to "shylarking." When arrested, Sarivola was still a certified police officer and

¹ In the record is the unusual reference to "shylarking." In the context of extortion, in which the term was used, counsel suggests that those using the term really meant to refer to "Shylocking," drawn from the name of Shylock, the extortionate lender in Shakespeare's *The Merchant of Venice*.

had been working several days a month as a reserve police officer for the City of New York. J.A. 72-75, 103-105, 154-157; R.T. Dec. 11, 1985 at 44.

Sarivola had engaged in violent criminal activity in his position with the Columbo crime family and Agent Ticano knew of specific crimes Sarivola had committed. J.A. 154, 156-157. After his arrest, Sarivola signed an agreement to become a paid informant for the FBI. J.A. 76, 105-106, 129-131, 134-135. Ticano had a contingent fee agreement with Sarivola. If he obtained incriminating statements from suspects, Sarivola knew that "customarily" he would be paid. The amount of the payments depended on the "quality of the information provided." J.A. 79, 105-106. The FBI promised not to seek prosecution for any crimes against Sarivola, no matter how serious or violent. On the extortion charge that had already been prosecuted, Sarivola received a mere sixty day prison sentence. J.A. 77, 129-131, 134-135, 142-143, 152-158, 194.

Sarivola began his sentence in Raybrook Federal Prison in September, 1983. J.A. 77, 194. At the direction of the FBI, he obtained information from inmates. J.A. 66, 76, 81-82, 105-106, 108, 129-131, 134-135, 137-139, 151, 153, 157-158. Sarivola was not paid by the FBI while in prison, because he was paid "c.o.d." This meant Ticano would pay for information only after it was verified. J.A. 79, 105-106, 127-128, 138-139, 141; R.T. Dec. 11, 1985 at 48.

Between March, 1983, and September, 1984, the FBI paid Sarivola \$22,490.00. He was paid for "running around town, whatever he had to do; gasoline, car rentals, phone calls, meals, nights out on the town with his buddies." J.A. 127-128, 131, 142-143.

B. Fulminante Was In Grave Danger In Prison.

Rumors spread throughout Raybrook that Fulminante had killed a child. J.A. 10, 80-81. The population at Raybrook included inmates convicted of violent crimes such as murder and robbery. J.A. 109. Prisoners known to have killed a child are "ostracized" and "in danger." J.A. 110.

As a result of the rumors, Fulminante was getting "tough treatment" from the other inmates and knew his life was in jeopardy. J.A. 10, 28-29, 40-41, 83, 109-110. Sarivola spoke about Fulminante's situation in prison during October, 1983:

Sarivola: No, his [Fulminante's] time was running short.

[Defense Counsel]: Well you got out before him, didn't you?

Sarivola: That doesn't mean his time wasn't running short—his time to keep walking around was running short.

[Defense Counsel]: I'm talking about getting out. . .

Sarivola: No, he would have got out—but it wouldn't have been the way I got out—he would have went out of the prison horizontally.

[Defense Counsel]: Why is that?

Sarivola: Because most organized crime figures and most criminals who have some sort of scruples, regardless of what most people believe; and children is a very soft point except for animals and ah the more the story began to be talked about and get around the joint a lot of people were thinking of hurting the little gentleman.

[Defense Counsel]: Okay.

Sarivola: And he sort of needed somebody to back him up and help him . . . people were starting to avoid him and treat him like shit. J.A. 28-29.

Fulminante was 5 feet 3 inches tall and weighed 118 pounds. At forty-two years of age, he was much older than most of the other inmates. He was of low average to average intelligence and had no formal education past the fourth grade. R. 88i, 88o, 88t, 88x.

Fulminante had served an earlier prison term when he was twenty-six years old. R. 88t, 88b1. At that time, he feared other inmates "were going to kill him." R. 88x. At his own request, he was placed in protective custody. R. 88t-88b1. Once there, he could not cope with the isolation and in the end, he was admitted to a psychiatric hospital because of his emotional condition and his extreme fear of other inmates. R. 88t-88b1.

C. Fulminante Denied All Guilt Until Sarivola Offered Him Protection.

Shortly after entering prison, Sarivola told Ticano of rumors that Oreste Fulminante had killed his step-daughter. J.A. 10, 80-82, 136. At this time, Ticano knew of Sarivola's "shylarking" activity and was aware that he made his living through violence. J.A. 133-134, 155-158. Ticano directed Sarivola to obtain incriminating statements from Fulminante. J.A. 10, 24, 27, 82, 108-109, 146.

Following Ticano's request, Sarivola repeatedly questioned Fulminante about the murder. Sarivola "continuously stayed around" Fulminante, spending several hours every day with him. Sarivola feigned friendship in order to obtain a confession. J.A. 80-82. Fulminante consistently denied any involvement in the murder. J.A. 81-82.

With only "a couple" weeks left before Sarivola's release, he employed a new approach. Sarivola reminded Fulminante that his life was in danger, and asked him about the murder. Sarivola then stated, "I will protect you in this prison from physical recriminations from other inmates," but, "for me to give you any help," "you have to tell me about it [the murder]" ² J.A. 24, 40-41, 82-83, 146. After being offered protection, Fulminante immediately confessed. J.A. 10, 28-29, 40-41, 83, 146.

Sarivola had the power to protect Fulminante from other inmates. In Raybrook, Sarivola held himself out as

² The statement was phrased in several variations by Sarivola. The stipulated facts for the pretrial hearing state that Sarivola asked Fulminante "if these rumors were in fact true adding that he, Mr. Sarivola, might be in a position to help protect the defendant from physical recriminations in prison, but that the defendant must tell him the truth" J.A. 10. At trial, Sarivola testified that Fulminante was "starting to get tough treatment" from the inmates at which time Sarivola told Fulminante, "You have to tell me about it, you know. I mean, in other words, for me to give you any help." J.A. 83. In a pretrial interview, Sarivola stated that Fulminante's life was in danger in prison and that Sarivola told him, "if you want my help you're gonna have to be straight" J.A. 28-29.

Prior to the pretrial argument on the voluntariness of the confession, the prosecutor had interviewed Sarivola for several hours and on at least three occasions. J.A. 88-93. At the pretrial argument the following dialogue then occurred:

[Prosecutor]: What I remember is that Mr. Sarivola said, "I will protect you in this prison from physical recriminations from other inmates," . . .

The Court: Was it in the context of, "I will protect you if you will tell me about this incident?"

[Prosecutor]: "If you will tell me the truth, did you or did you not kill this girl?" "Whether you did or didn't," was not the crux. The crux was, "Just tell me the truth and I will protect you then, because some of these inmates here may try to hurt you physically" . . . J.A. 41.

an influential member of an organized crime family. J.A. 45-48, 66-67, 78. Further, Sarivola served on a prison commission that had "some control over what went on there in the prison." The prosecutor admitted Sarivola "was in a position to probably help provide physical protection." J.A. 41-42.

D. The FBI Exerted Pressure Upon Sarivola To Obtain Incriminating Statements From Suspects.

1. Sarivola Was Pressured Into Producing A "Phony Tape."

In January, 1984, after Sarivola was released from prison, Agent Ticano told Sarivola to obtain information on a suspect named "Mike." Shortly thereafter, Sarivola gave Ticano an audio tape of a conversation allegedly between Sarivola and "Mike." "Juice" (interest on extortionate loans) was discussed on the tape. J.A. 97-98, 100-102, 139-140.

The tape proved to be a "phony." Background noise on the tape was inconsistent with the location where the alleged conversation occurred. This made the FBI suspicious. In response to Ticano's questions, Sarivola insisted that the taped conversation was authentic. Ticano demanded a polygraph test, which Sarivola failed. Sarivola then admitted that he had been lying and that the tape was a fraud. J.A. 140-141.

The FBI investigation of "Mike" had been moving slowly. Agent Ticano admitted, "I was receiving pressure from my boss, and so I kind of leaned on Tony [Sarivola] to accomplish, you know, the task that we had set out to do, and I guess he felt pressured" J.A. 139. Sarivola testified that Ticano was "putting a lot of pressure on me" and as a result, Sarivola fabricated the conversation and

continued to lie about it. The FBI continued to use Sarivola as a paid informant. J.A. 96-98, 141.

2. Sarivola Obtained A Confession Within Twenty-Four Hours Of Being Told By Ticano To "Get Me The Whole Story."

When he first heard of the rumors, Ticano told Sarivola, "I don't know anything about it, find out what it's about." J.A. 24. Ticano "didn't pressure" Sarivola at that time because he did not know anything about the crime. Sarivola stated, "If he's [Ticano is] going to lean on somebody, if he's gonna do something, he wants to know what he's doing." J.A. 25-26.

On October 20, 1983, Ticano went to Raybrook to talk to Sarivola "on an unrelated matter." Sarivola gave Ticano "a little bit more" information regarding the murder. Ticano then told him, "I gotta know the whole story. Get me the whole story." J.A. 24, 146. According to Ticano, within twenty-four hours he received a telephone call from Sarivola informing him that Fulminante had made a full confession to the murder. J.A. 24, 144-148. According to Sarivola, it was several days after the personal visit from Ticano that he obtained the confession. J.A. 27-28.

II. The State Of Arizona Concedes That There Was Not A "Triable" Case Against Fulminante In The Absence Of A Confession.

Although the victim died on September 13, 1982, the state did not charge Fulminante until September 4, 1984. J.A. 2. This did not occur until five months after his release from prison and his alleged confession to Sarivola's wife. J.A. 2, 91-92, 110.

In his opening statement, the prosecutor stated:

[B]ut what brings us to court, what makes this case fileable, and prosecutable and triable is that later, Mr. Fulminante confesses this crime to Anthony Sarivola and later, to Donna Sarivola, his wife.

J.A. 65-66. In the Answering Brief filed with the Arizona Supreme Court, the State of Arizona conceded that prior to the confessions, although the police suspected Fulminante, they did not have enough evidence to charge him. J.A. 193-194.

III. The Arizona Supreme Court Specifically Stated It Applied The "Totality Of The Circumstances" Test When It Found That The Confession Was "Coerced In Every Sense Of The Word."

In the original opinion, the Arizona Supreme Court stated:

Defendant contends that because he was an alleged child murderer, he was in danger of physical harm at the hands of other inmates. Sarivola was aware that defendant faced the possibility of retribution from other inmates, and that in return for the confession with respect to the victim's murder, Sarivola would protect him. Moreover, the defendant maintains that Sarivola's promise was "extremely coercive" because the "obvious" inference from the promise was that his life would be in jeopardy if he did not confess. We agree.

Pet. App. A19. In its supplemental opinion, the Arizona Supreme Court again examined the "totality of the circumstances," and held that "This is a true coerced confession in every sense of the word." Pet. App. C9.

The Arizona Supreme Court held the trial court's voluntariness ruling to be "clear and manifest" error. The Arizona Supreme Court stated that the error was caused by defense counsel's failure to present any evidence at the

voluntariness hearing. Pet. App. A20-A21. Defense counsel submitted the issue on the version of the facts set out by the prosecutor in his motion. J.A. 10, 30-31, 40, 42-43.

SUMMARY OF ARGUMENT

1. In October, 1983, Oreste Fulminante was an inmate when rumors spread throughout Raybrook Prison that Fulminante had murdered a child. As a result, Fulminante was in grave danger of physical harm from the other inmates.

At the same time, Anthony Sarivola was a government informant working in the prison. He had the power to protect Fulminante from the other inmates. Sarivola had a known affiliation with the Columbo organized crime family. He also had power because of his position on a prison commission.

Sarivola was directed by an FBI agent to get a confession from Fulminante. Sarivola approached Fulminante and reminded him that his life was in jeopardy. Sarivola then stated he would protect Fulminante from the other inmates, but only if he confessed to the murder. Fulminante was forced to renounce his repeated denials and confess to be protected. He immediately confessed.

This case is indistinguishable from *Payne v. Arkansas*, 356 U.S. 560 (1958), in which this Court held that the confession was coerced. In *Payne* the defendant was arrested for murder and, despite repeated questioning, refused to confess. The police chief then told the defendant that there was a mob outside the police station that wanted "to get him." However, if he "told the truth" about the murder, the police chief "would probably keep them from coming in."

2. In *Brown v. Mississippi*, 297 U.S. 278 (1936), this Court held coerced confessions inadmissible under the Due Process Clause of the Fourteenth Amendment. Under this tenet, if a coerced confession is admitted at trial, the conviction must be vacated no matter how overwhelming the other evidence. In twenty-four opinions this Court has held, under the Due Process Clause, that the harmless error doctrine cannot apply to the admission of a coerced confession.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that harmless error analysis could apply to constitutional error, but specifically noted that the doctrine could not apply to coerced confessions. Since *Chapman*, this Court has reaffirmed this principle on at least five occasions. In *Mincey v. Arizona*, 437 U.S. 385 (1978), a coerced confession was admitted at trial. This Court again held that the harmless error doctrine could not apply and the case was reversed.

In *Rose v. Clark*, 478 U.S. 570 (1986), this Court stated, "This limitation recognizes that some errors necessarily render a trial fundamentally unfair." As Justice Stevens stated in a concurring opinion, this is because "our Constitution and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination." 478 U.S. 570, 588.

In *Rogers v. Richmond*, 365 U.S. 534 (1961), this Court held that harmless error analysis was inapplicable to a coerced confession, and stated:

This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence indepen-

dently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

365 U.S. 534, 540-541. This analysis was explicitly approved in *Miller v. Fenton*, 474 U.S. 104, 109-110, and this Court further stated that certain interrogation techniques "are so offensive to a civilized system of justice that they must be condemned." 474 U.S. 104, 109.

3. In September, 1982, FBI Agent Ticano was responsible for the arrest of Sarivola for extortion. The arrest was the result of Sarivola's "shylarking" in New York City for the Columbo organized crime family. Money was loaned at exorbitant interest rates and Sarivola used violence to collect on the loans. At the same time, Sarivola was working as a certified police officer.

Agent Ticano knew Sarivola had an extensive history of violent crime and knew of specific crimes he had committed. However, Ticano did not seek a lengthy prison term. Instead, Ticano gave Sarivola a written contract that assured that he would not do more than sixty days in prison.

Sarivola was employed on a contingent fee basis. He would be paid well, but only if he obtained incriminating statements from targeted suspects. Payment was made according to the "quality of the information provided."

Ticano knew that Sarivola had a long history of obtaining results by using violence. Ticano knew that if he directed Sarivola to obtain a confession, there was a strong likelihood that Sarivola would use violence to do so.

In January, 1984, Ticano targeted a suspect and pressured Sarivola to get information. Ticano admits that on this occasion he unduly pressured Sarivola. Sarivola also

acknowledges that Ticano applied extreme pressure on him to get incriminating information. Responding to this pressure, Sarivola produced an audio tape recording with incriminating evidence against the target. This was done in order to get Ticano "off his back." Sarivola admitted the tape was a fraud only after failing a polygraph examination.

Ticano knew that Sarivola would obtain information for him by either lying or using violence. Ticano continued to use Sarivola against targeted suspects.

Sarivola was unable to obtain a confession through the use of the deception of friendship. With only "a couple weeks" left on Sarivola's prison term, Ticano visited him in prison and directed him to "get the whole story." Within twenty-four hours of this directive, Sarivola obtained a confession.

In *Spano v. New York*, 360 U.S. 315 (1959), in addition to a coerced confession, there was also a second voluntary confession and an eyewitness testified. Despite the overwhelming evidence of guilt, this Court held the conviction had to be reversed. This Court stated:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that *in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.* (Emphasis added).

360 U.S. 315, 320-321. The conduct of Agent Ticano shows the continued validity of the above principle.

To understand the unconscionability of Agent Ticano's actions, one should consider the fact that if condoned,

Ticano could target any citizen. Ticano's conduct is by no means limited to a prison setting. Indeed, evidence was presented at trial, that while out of prison Sarivola was directed to obtain information from a targeted suspect.

No one can truly feel free knowing that at Ticano's whim, Sarivola could be sent to obtain a confession from that person. Not many people are a fair match for a professional schooled in the art of using violence to obtain what he wants. If Ticano offered Sarivola a sufficient contingent fee, there is little doubt that Sarivola would obtain a confession from any targeted person.

The State of Arizona has conceded that Sarivola was a government agent in Raybrook. His interrogation technique is so offensive to a civilized system of justice that it should be condemned. The conduct of FBI Agent Ticano in this case is even more egregious.

ARGUMENTS

I. FULMINANTE'S CONFESSION WAS IMPROPERLY ADMITTED AT TRIAL AS IT WAS THE PRODUCT OF EXTREME COERCION.

A. A Government Agent Gave Fulminante The Choice Of Physical Harm At The Hands Of Hostile Inmates Or Receipt Of Protection In Exchange For A Confession.

1. Informant Sarivola Knew The Use Of Coercion Was Necessary To Obtain A Confession.

Immediately prior to the confession, Sarivola told Fulminante that he was in grave danger. J.A. 10, 28-29, 40-41. The State of Arizona concedes that Fulminante "thought Sarivola still had connections with organized crime and would have been able to protect him." Brief of Petitioner 9-10. Sarivola also had the power to protect Fulminante because of his position on a prison commission. J.A. 41-42. However, the state contends that Fulmi-

nante's will was not overborne by the offer of protection.³ Brief of Petitioner 9-10, 18-19.

It is the state's contention that it was merely a coincidence that Fulminante confessed immediately after the offer of protection. This ignores the fact that under the guise of friendship, Sarivola had repeatedly questioned Fulminante about the murder. Fulminante had consistently denied any involvement. J.A. 80-82.

Sarivola's actions show that he believed the offer of protection was necessary to overbear Fulminante's will. He was in the best position to make that judgment, as he was present and entirely aware of the surrounding circumstances. Obviously, he determined that such an offer was necessary. Otherwise, there was no reason to offer protection in exchange for a statement from Fulminante.

Sarivola's judgment that physical coercion was necessary should be viewed in light of the fact that Sarivola had successfully gone through the police academy. He was certified as a police officer by the State of New York. J.A. 72-75, 103-105, 154-157; R.T. Dec. 11, 1985 at 44. Police officers are trained in the art of interrogation and know what psychological ploys are successful. These range from deception to the "Mutt and Jeff" act. See *Miranda v. Arizona*, 384 U.S. 436, 447-455 (1966).

Sarivola's professional assessment of the need for coercion was proven correct. Although Fulminante had con-

³ The state also implies that the confession is voluntary because Fulminante never claimed that he confessed to obtain protection. Brief of Petitioner i, 19. A defendant is not required to make a statement to prove coercion. In *Lee v. Mississippi*, 332 U.S. 742 (1948), this Court held that a confession was coerced even though the defendant denied confessing.

tinually denied involvement, he confessed when offered protection. The State of Arizona offers no other explanation for this abrupt change in Fulminante's position. Clearly, Fulminante's will was overborne by Sarivola's calculated use of coercion.

2. Sarivola Required Fulminante To Give A "Full Confession" In Exchange For Protection From Physical Harm.

a. The state concedes that Sarivola told Fulminante that he had to "tell the truth" in order for Sarivola "to give him any help" with the threat of physical harm from other inmates. Brief of Petitioner 5. The State of Arizona contends that Sarivola did not require a confession and that Fulminante "had to know that Sarivola would still help him, regardless of what he said, *if Sarivola believed him.*" Brief of Petitioner 22 (emphasis added). The facts belie this contention.

First, requiring Fulminante to make any statement violates his right to remain silent under the Fifth Amendment. An individual is denied his Fifth Amendment privilege against self-incrimination, if government conduct denies him a "free choice to admit, to deny, or to refuse to answer." *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) (emphasis added). This is equally true under the Due Process Clause. Any statement by Fulminante, whether true or not, was therefore coerced and thus, inadmissible at trial.

Sarivola was not going to accept anything less than a confession from Fulminante. He worked on a contingent fee basis with FBI Agent Ticano. Sarivola was paid according to the "quality" of the information he obtained. J.A. 79, 105-106, 127-128, 138-139, 141; R.T. Dec. 11, 1985 at 48. It cannot seriously be argued that he was going to

receive payment for statements completely exonerating suspects.

Sarivola had questioned Fulminante about the murder on numerous occasions. Fulminante had continually denied any involvement. If Sarivola had "believed" the consistent denials, there was no reason for him to require another denial. Sarivola's actions made it clear to Fulminante that he would not accept any statement other than a confession.

In *Payne v. Arkansas*, 356 U.S. 560 (1958), a police chief informed the defendant that if he would "tell the truth" about a murder, the police chief would protect him from an angry mob. Prior to the statement the defendant had continually denied guilt. As he immediately confessed after the statement, this Court held that the confession was coerced. In *Payne*, this Court considered the police chief's request for "the truth" to be a demand for a full confession. Similarly, in this case, Sarivola's request for "the truth" was clearly a demand for a confession.

b. The Solicitor General contends that the confession was not coerced because Sarivola did not personally threaten to injure Fulminante, but rather, was only going to allow others to harm him. Brief for the United States 6, 15. This same contention was rejected in *Payne v. Arkansas*. This Court stated:

[t]here is torture of mind as well as body; the will is as much affected by fear as by force A confession by which life becomes forfeit must be the expression of free choice. (Citation omitted.)

356 U.S. 560, 566-567.

It cannot seriously be claimed that one is less compelled to answer questions if a gun is held to one's head by a third person, rather than by the interrogator. This is especially

true if the interrogator has the power to stop the person holding the gun. See *Beecher v. Alabama (I)*, 389 U.S. 35 (1967). Fulminante was subject to physical harm at the hands of other inmates, and the interrogator, Sarivola, had the power to stop the other inmates. Sarivola made it clear to Fulminante that if he did not cooperate with him, Fulminante was going to receive rough treatment from the other inmates.

B. When A Confession Is Obtained After Threats Of Physical Brutality, It Should Be Held Coerced *Per Se*.

This Court has found some situations so inherently coercive that no examination of the personal characteristics of the defendant was necessary. See *Davis v. North Carolina*, 384 U.S. 737 (1966); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944). Implicit in such rulings is the view that some police techniques, such as threats of physical brutality, would lead any person to confess.

This Court has applied this "per se" reversal rule where a suspect has been confronted with the threat of direct physical harm. *Beecher v. Alabama (I)*. This rule has also been applied in cases where the defendant has been threatened with the possibility of mob violence. *Chambers v. Florida*, 309 U.S. 227 (1940); *Ward v. Texas*, 316 U.S. 547 (1942).

In *Stein v. New York*, 346 U.S. 156 (1953), this Court stated:

When [physical violence or the threat of it] is present, there is no need to weigh or measure its effects on the will of the individual victim. The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by

treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.

346 U.S. 156, 182.

Fulminante's will was overborne by the threat of physical brutality at the hands of other inmates. This Court need not look at other "circumstances." This Court should hold, *per se*, that the confession was coerced.

C. Applying The "Totality Of The Circumstances" Test, The Confession Was Clearly Coerced.

The state argues that under the "totality of the circumstances" test, the confession was voluntary. The state alleges only two "circumstances" to support this claim. First, that Fulminante was not vulnerable to threats, and second, that there was no misconduct by government agents.

1. Fulminante Was Vulnerable To Threats Of Physical Harm.

The state concedes that Sarivola's offer of protection could be viewed as "objectively coercive" and "could well have been sufficient inducement to overbear the will of a young, weak, or fearful individual." Brief of Petitioner 19-20. However, the state contends that Fulminante's will was not overborne because he had been to prison twice before and therefore, "was already a hardened criminal who knew how to take care of himself while in prison." Brief of Petitioner 18.

This conclusion is contradicted by the facts. If Fulminante "knew how to take care of himself while in prison," he would not have been in danger from other inmates. Certainly, at 5 feet 3 inches tall, 118 pounds, and forty-two years of age, Fulminante did not have a physical advan-

tage over other inmates. R. 88x, 88a1. Further, his low average to average intelligence gave him no advantage. R. 88i, 88o; Brief of Petitioner 18.

The conclusion that Fulminante "knew how to take care of himself," ignores the serious difficulties he experienced during earlier imprisonment. At twenty-six, he was so terrified of being in the general prison population, that he was placed in protective custody at his own request. However, he could not emotionally handle the isolation of protective custody and, with no other alternative, a psychiatrist had Fulminante committed to a psychiatric hospital. R. 88t-88b1.

Fulminante was in the general population at Raybrook. J.A. 77-78, 80, 107. The state failed to prove that Fulminante was more capable of coping with prison life in 1983. If anything, it would have been even more difficult to cope with prison life at forty-two years of age, than it had been at twenty-six.

It appears that Fulminante was able to cope in Raybrook only because he thought Sarivola had befriended him. Sarivola had the power to protect him from the other inmates, and he could survive with this influential friend. There is no doubt his will was overborne when Sarivola told him he would have no protection from the other inmates if he did not confess.

2. The Conduct Of FBI Agent Ticano Threatens The Very Core Of A Free Society.

a. Ticano Sent A Known Violent Criminal To Obtain Statements From Fulminante.

Sarivola was a "dirty cop." Agent Ticano employed him to do police investigation work. However, Sarivola no longer wore a uniform, as he now was involved in secret

police activities. Ticano targeted specific individuals and told his professional "strong arm man" he would be well paid, but only if he obtained incriminating statements from his targets.

Ticano knew that for years Sarivola got what he wanted through the use of force. Ticano had to know that if he requested a confession, there was a strong likelihood Sarivola would use the threat of force to obtain it. Sarivola had not collected payments for the Columbo family through the mere use of his charm.

Knowing that the deception of friendship had not worked, Ticano told Sarivola, "I gotta know the whole story. Get me the whole story." J.A. 24, 146. Ticano knew Sarivola had substantial incentives to obtain what Ticano requested and knew that Sarivola was literally a professional at obtaining what was requested by his employer.

It is difficult to envision more reprehensible conduct by the police than sending a violent criminal to approach a singled-out suspect. This conduct is even more egregious when the police give this professional "strong arm man" substantial financial and other incentives to "shake down" his prey for information. This is the conduct one might expect from secret police in a repressive society. It certainly is repugnant to the concept of liberty under the Due Process Clause of the Fourteenth Amendment.

Ticano could target any citizen. Ticano's conduct is by no means limited to a prison setting. Indeed, evidence was presented at trial, that while out of prison, Sarivola was directed to obtain information from a suspect named "Mike."

No citizen can feel free knowing that at Ticano's whim, Sarivola could be sent to obtain his confession. Few citizens are a fair match for a professional "strong arm man."

If Ticano offered a sufficient fee, Sarivola could obtain a confession from any targeted citizen.

b. Ticano Exerted Pressure Upon Sarivola To Obtain A Confession.

Sarivola stated that when Ticano "wanted" results, he would put extreme pressure upon Sarivola. Ticano knew of Sarivola's propensity for the use of violence to obtain what he wanted. In light of this fact, it was unconscionable for Ticano to exert pressure on Sarivola to obtain a confession. It was certainly foreseeable that Sarivola would use the threat of force to obtain a confession.

The fact that Sarivola did not threaten to personally hurt Fulminante does not mitigate Ticano's misconduct. Ticano knew Sarivola had failed in the use of deception. If Sarivola had been unsuccessful in his attempts to exploit the threats of others, Ticano should have known Sarivola would in all likelihood, either personally use force to obtain a confession or simply fabricate one.

D. The Facts Of This Case Are Indistinguishable From The Facts In *Payne v. Arkansas* In Which This Court Held The Confession Was Coerced.

In *Payne v. Arkansas*, the defendant was arrested for murder. He was interrogated for an "extended time" and continually denied any involvement in the murder. The police chief then told the defendant that he had "not told him all of the story—he [police chief] said that there was 30 or 40 people outside that wanted to get me, and he said if I would come in and *tell him the truth* that he would probably keep them from coming in." 356 U.S. 563, 564 (emphasis added).

Other inmates "wanted to get" Fulminante. Sarivola told Fulminante that if he would "tell him the truth," he

"would probably keep them from coming" after him. In *Payne*, this Court placed substantial importance on the fact that the defendant had continually denied involvement, but after the police chief's statement, immediately confessed. Fulminante also continually denied involvement in the murder, but after Sarivola's statement, immediately confessed.

In *Payne*, this Court also considered the fact that the defendant was "mentally dull" with only a fifth grade education; not advised of his right to remain silent or of his right to counsel as required by Arkansas statutes; and, held in custody without benefit of counsel, friends or family members.

Fulminante has low average to average intelligence and no formal education past the fourth grade. He was not given *Miranda* rights or otherwise informed that he had the right to remain silent and the right to counsel. He was held in prison without benefit of counsel or a "true" friend.

The only difference between *Payne* and Fulminante was their age and the fact that *Payne* had been given a limited amount of food before the confession. *Payne* was nineteen years old. These factors clearly do not distinguish this case from *Payne v. Arkansas*.

In *Payne*, this Court stated, "It seems obvious from the totality of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice.'" 356 U.S. 560, 567 (footnotes omitted). This Court stated that the use at trial of this coerced confession, "deprived him [Payne] of 'that fundamental fairness essential to the very concept of justice,' and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment." 356 U.S. 560, 567. (Footnote omit-

ted). Fulminante also has been denied "fundamental fairness." His conviction cannot be allowed to stand.

E. The Conduct Of Sarivola Constitutes State Action.

Coercive police activity is a predicate to finding that a confession is involuntary. *Colorado v. Connelly*, 479 U.S. 157 (1986). The State of Arizona concedes that at all pertinent times Sarivola was a paid FBI informant.⁴ Brief for Petitioner 4-5. Undercover police officers posing as fellow inmates are government agents. *Illinois v. Perkins*, 1990 U.S. LEXIS 2885 (decided June 4, 1990). See also *United States v. Henry*, 447 U.S. 264 (1980). Sarivola was no less a government agent by the mere distinction that he was a "dirty" policeman.

II. ADMISSION OF A COERCED CONFESSION IS NOT SUBJECT TO HARMLESS ERROR ANALYSIS.

A. This Court Has Held In Twenty-Five Opinions And Over A Span Of Ninety Years That A Coerced Confession Is Not Subject To Harmless Error Analysis.

This Court has been unequivocal for over 90 years in holding that a conviction cannot be allowed to stand if a "coerced" confession is admitted at trial. This principle has been stated by this Court in no fewer than twenty-five

⁴ At the pretrial hearing on the voluntariness of the confession, it was stipulated that "Anthony Sarivola was at all times pertinent to this case a paid confidential informant for the F.B.I." J.A. 10, 30-31, 40, 42-43. During trial, the prosecutor, Agent Ticano and Sarivola, admitted that while in Raybrook Prison, Sarivola was a paid government informant. J.A. 66, 76, 81-82 105-106, 108, 129-131, 134-135, 137-139, 151, 153, 157-158. Thus, the State of Arizona conceded before the Arizona Supreme Court and now concedes before this Court, that Sarivola was a government agent. J.A. 194; Brief of Petitioner 4.

opinions.⁵ The opinions hold that no matter how sufficient the evidence aside from a coerced confession, the harmless error doctrine cannot apply. This Court has never made exceptions to this principle.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that some constitutional errors are subject to the harmless error doctrine. However, this Court specifically stated:

[t]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.⁸ . . .

* * *

8. See, e.g., *Payne v. State of Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (coerced confession) . . . 87 S.Ct. at 827-828. (Emphasis added.)

In his concurring opinion in *Chapman*, Justice Stewart stated that the inapplicability of the harmless error rule to

⁵ *Bram v. United States*, 168 U.S. 532 (1897); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940); *Lisenba v. California*, 314 U.S. 219 (1941); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Lyons v. Oklahoma*, 322 U.S. 596 (1944), rehearing denied, 323 U.S. 809; *Malinski v. New York*, 324 U.S. 401 (1945); *Haley v. Ohio*, 332 U.S. 596 (1948); *Watts v. Indiana*, 338 U.S. 49 (1949); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Stroble v. California*, 343 U.S. 181 (1952), rehearing denied, 343 U.S. 952; *Brown v. Allen*, 344 U.S. 443 (1953), rehearing denied, two cases, 345 U.S. 946; *Payne v. Arkansas*, 356 U.S. 560 (1958); *Spano v. New York*, 360 U.S. 315 (1959); *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Rogers v. Richmond*, 365 U.S. 534 (1961); *Lynum v. Illinois*, 372 U.S. 528 (1963); *Haynes v. Washington*, 373 U.S. 503 (1963); *Jackson v. Denno*, 378 U.S. 368 (1964); *Chapman v. California*, 386 U.S. 18 (1967); *Lego v. Twomey*, 404 U.S. 477 (1972); *Mincey v. Arizona*, 437 U.S. 385 (1978); *New Jersey v. Portash*, 440 U.S. 450 (1979); *Connecticut v. Johnson*, 460 U.S. 73 (1983); *Rose v. Clark*, 478 U.S. 570 (1986).

coerced confessions does not turn on their evidentiary impact. Rather, the constitutional right involved is so fundamental and absolute that it will not permit courts to indulge in nice calculations as to the harm arising from its denial.

This Court has considered this issue since *Chapman*. In *Mincey v. Arizona*, 437 U.S. 385 (1978), coerced statements were used for impeachment. This Court held that any "use against a defendant of his *involuntary* statement is a denial of due process of law." 437 U.S. 385, 398. This was true "even though there was ample evidence aside from the confession to support the conviction." 437 U.S. 385, 398.

In holding that harmless error analysis cannot apply to coerced statements, this Court specifically cited *Chapman v. California* as authority. 437 U.S. 385, 398. This Court also cited several other cases including *Haynes v. Washington*, 373 U.S. 503 (1963), and *Stroble v. California*, 343 U.S. 181 (1952), as noteworthy. In *Stroble* there were five admissible confessions, and in *Haynes*, two admissible confessions in addition to a coerced confession. This Court held in each case that the harmless error doctrine could not apply.

In *Rose v. Clark*, 478 U.S. 570 (1986), this Court stated:

Despite the strong interests that support the harmless-error doctrine, the Court in *Chapman* recognized that some constitutional errors require reversal without regard to the evidence in the particular case. 386 U.S. at 23, n. 8, . . . citing *Payne v. Arkansas*, . . . (introduction of coerced confession) . . . This limitation recognizes that some errors necessarily render a trial fundamentally unfair. (Emphasis added and citations omitted.)

478 U.S. 570, 577. This Court found that admission of a coerced confession "aborted the basic trial process." 478 U.S. 570, 578 n. 6.

In a concurring opinion, Justice Stevens stated:

[V]iolations of certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial The admission of a coerced confession can never be harmless even though the basic trial process was otherwise completely fair and the evidence of guilt overwhelming.³

3. See *Payne v. Arkansas* . . . ("[T]his Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment") . . . (Emphasis added.)

478 U.S. 570, 587-588. The opinion continues:

In short, as the Court has recently emphasized, our Constitution, and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination. (Footnote omitted).

478 U.S. 570, 588. *Rose v. Clark* again makes it clear that a conviction should be vacated if a coerced confession is admitted at trial, no matter how overwhelming the other evidence.

B. In Five Cases, This Court Held Admission Of A Coerced Confession Cannot Be Harmless Error, Even Though Other Confessions Were Properly Admitted.

In five cases, this Court has held that where a coerced confession is admitted at trial, it is irrelevant that there

are other properly admitted confessions. The conviction must be reversed. *Stroble v. California*, 343 U.S. 181 (1952) (five admissible confessions); *Malinski v. New York*, 324 U.S. 401 (1945) (three admissible confessions); *Haynes v. Washington*, 373 U.S. 503 (1963) (two admissible confessions); *Spano v. New York*, 360 U.S. 315 (1959) (one admissible confession); *Payne v. Arkansas*,⁶ 356 U.S. 560 (1958) (one admissible confession).

C. The Harmless Error Doctrine Is Inapplicable To The Facts In This Case.

1. There Was Not "Overwhelming" Evidence In Addition To The Improperly Admitted Confession.

a. The State Had A Weak Case In The Absence Of The Confessions.

The victim died on September 13, 1982. The indictment was not filed until September 4, 1984, which was after the confessions to Sarivola and his wife. The logical conclusion

⁶ In *Payne v. Arkansas*, this Court held that a conviction had to be vacated because a "coerced" confession had been admitted at trial. After retrial, the case was considered on appeal by the Supreme Court of Arkansas. *Payne v. State*, 332 S.W.2d 233 (1960). The Arkansas court discusses the fact that aside from the first "coerced" confession, there was a reenactment of the crime which constituted a second confession. 332 S.W.2d 233, 235. The dissenting opinion notes that in this Court's opinion in *Payne v. Arkansas*, there is no mention whatsoever of the second confession. 332 S.W.2d 233, 236.

The state court in *Payne* considered the issue of whether or not the second confession was voluntary and thus admissible at trial. Obviously, as this Court did not discuss the second confession at all, this Court was not concerned whether the second confession was voluntary. In light of this fact, and the fact that this Court vacated the conviction, the only logical conclusion is that this Court determined that the conviction based on a coerced confession had to be vacated even if there was a second admissible confession.

is that the prosecution did not feel it could make its case in the absence of a confession. The State of Arizona concedes this fact. J.A. 2, 65-66, 195.

b. Donna Sarivola's Testimony Is Subject To Substantial Doubt.

This Court has never allowed harmless error analysis to be applied to the admission of a coerced confession. As to other constitutional error, before it "can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

This case was not "triable" in the absence of the confessions. The confession to Anthony Sarivola was inadmissible as it was coerced. Thus, based solely on admissible evidence, the state's case now rests on Donna Sarivola's testimony.

Donna Sarivola's testimony by no means constitutes overwhelming evidence. Her entire testimony comprises only twenty-nine transcript pages and is highly suspect. R.T. Dec. 13, 1985 at 5-33.

The day Fulminante was released from prison, Anthony and Donna Sarivola went to considerable inconvenience to pick him up in New York City. This was done so he could go on a trip with them to Pennsylvania. J.A. 110-111, 114-115, 165-168, 176-177. Sarivola testified that he was thoroughly repulsed when Fulminante confessed to him, because only an animal would commit such a crime against a child. J.A. 28-29, 87. In light of this fact, it is incredible that Sarivola would inconvenience himself so Fulminante could meet Sarivola's wife and travel with them.

Donna testified that within a couple hours of meeting Fulminante, she "just casually asked him why he was

going" with them to meet Anthony's friends, instead of visiting his relatives. According to Donna, in response to this question, Fulminante made a full confession. J.A. 167-168. It is extremely doubtful that anyone, in response to a casual question from a new acquaintance, would confess to a murder.

According to Donna, she too was disgusted by the confession, however, she never notified anyone of it. Shortly after the confession, she mentioned to her husband that the confession disgusted her, but she did not discuss it with him or anyone else. Although claiming she was disgusted, Donna admits that she later went on a second trip with Fulminante. J.A. 114-115, 171-174, 179.

Over a year later, Anthony Sarivola was being interviewed by the prosecutor when Sarivola telephoned his wife. Sarivola asked her if she could "remember" the confession Fulminante had made to her. Sarivola said "gee, it had slipped his mind" that Fulminante had also confessed to Donna. J.A. 88-92, 114, 170.

It is impossible to believe that anyone would forget that their wife had heard someone confess to murdering a child. This is even more true because Sarivola was a member of the Columbo family, and as the presentence writer states, it is common knowledge that such persons greatly abhor any violence against children. Sarivola testified that he was repulsed by this crime. J.A. 28-29, 87, 104; R. 88.

There is a more logical explanation for Sarivola's sudden recollection that Fulminante had confessed over a year earlier to Donna. He probably suspected that the prosecutor had reservations about the truthfulness of the first confession. Indeed, even after the first confession, the prosecutor had not filed charges and allowed Fulminante

to be released from prison. Sarivola then came up with corroboration by having his wife also testify to having heard a confession.

Sarivola was in the Federal Witness Protection Program when he first announced the second confession. J.A. 88-92, 114, 127, 170. He was under great pressure to be believed by the authorities as he would not be allowed to remain in the program if it was determined that he had lied. J.A. 182. Sarivola had been accepted into the program in August, 1984, after organized crime members attempted to "assassinate" him. Donna was accepted a few months later. J.A. 94.

In March, 1985, the Sarivola's had to be reapproved for the program. Donna admitted that being in the Witness Protection Program was "very important for Tony [Sarivola]." Anthony Sarivola testified that the Witness Protection Program "was necessary to maintain life" for the Sarivola family. J.A. 130-131, 179-180, 182.

c. The "Confession" To Donna Sarivola Was Uncorroborated By The Physical Evidence.

Donna Sarivola testified that when Fulminante confessed, he said that he took the victim into the desert; beat and sexually assaulted her; "choked her until he thought he choked every last breath out of her"; and then shot her. J.A. 168-169. Physical evidence from wounds failed to corroborate this. The medical examiner testified that there was no evidence that the victim was beaten or sexually assaulted. J.A. 186-188; R.T. Dec. 16, 1985 at 55, 59-60. In the special verdict at sentencing, the trial court specifically stated that it could not make a finding that the victim had been sexually assaulted, because there was no corroboration from the medical examiner. J.A. 192.

The medical examiner testified that there was no evidence that the victim was choked. Although a torn towel was found around the victim's neck, the medical examiner concluded that it "doesn't have anything to do with the death." J.A. 187. Therefore, there exists doubt about whether Fulminante ever confessed to Donna.

Donna testified that the killing occurred in the desert, but gave no details as to location or how the victim was transported there. Further, Donna testified that Fulminante admitted to shooting the victim, but Donna could not recall how many times he said he shot her. J.A. 168-169. It is obvious that Donna was trying to support her husband in his testimony, but could not produce sufficient details to corroborate either confession.

2. Evidence Of Highly Prejudicial Matters Was Admitted Solely In Conjunction With The Confession To Informant Sarivola.

The admission of the confession to Sarivola is not harmless error beyond a reasonable doubt. The following items of evidence were admitted solely in conjunction with the prison setting in which the confession to Sarivola was made:

1. That Fulminante had a prior felony conviction for being a felon in possession of a firearm. J.A. 45-48, 53-54, 56-64, 67-70; R.T. of Dec. 4, 1985 at 39-40; R.T. of Dec. 10, 1985 at 82.
2. That Fulminante had a prior felony conviction for uttering false instruments. J.A. 45-48, 53-54, 56-64, 67-70; R.T. of Dec. 4, 1985 at 39-40; R.T. of Dec. 10, 1985 at 82.
3. That Fulminante had been sent to prison on two separate occasions. J.A. 45-48, 53-54, 56-64,

67-70; R.T. of Dec. 4, 1985 at 39-40; R.T. of Dec. 10, 1985 at 82.

4. That Fulminante had a reputation in prison for being untruthful. J.A. 85, 185.
5. That Ticano vouched for the fact that Sarivola had been truthful. J.A. 137.
6. That Fulminante knowingly associated with a member of an organized crime family. J.A. 45-48, 66-67; R.T. of Dec. 4, 1985 at 27-29; R.T. of Dec. 11, 1985 at 12-14.

Fulminante did not testify at trial. If the confession had been suppressed, these items would not have been admitted.

The above items have no relevance to the second confession to Donna Sarivola. That confession did not take place in a prison setting. J.A. 91-92, 110-111. If only the confession to Donna had been admitted at trial, the above items would have been inadmissible. Therefore, the confession to Anthony Sarivola was not merely "cumulative" to the second confession.

D. An Accusatorial System Of Justice Cannot Tolerate The Application Of The Harmless Error Doctrine To Coerced Confessions.

1. Over Two Hundred Years Of Anglo American Law Have Held That Coerced Confessions Are Inadmissible.

The concept of voluntariness of confessions is deeply rooted in English common law. Until the middle of the seventeenth century, confessions were admissible in English courts regardless of the method of extraction. Even torture was accepted as a method of persuasion. McCormick on Evidence note 2, at 372 (3d ed. 1984);

Developments in Law—Confessions, 79 Harv. L. Rev. 935, 954 (1966).

In *King v. Warickshall*, 168 Eng. Rep. 234 (K.B. 1783), the English Court held that a "confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable shape when it is to be considered as the evidence of guilt that no credit ought to be given to it; and therefore it is rejected." 168 Eng. Rep. 234, 235. This doctrine was adopted as part of federal evidence law by this Court in *Hopt v. Utah*, 110 U.S. 574 (1884). Later, in *Bram v. United States*, 168 U.S. 532 (1897), this Court held that use of a coerced confession was reversible error *per se* because it could never be said the "confession was not prejudicial." 168 U.S. 532, 541.

The decisions of this Court since *Bram* have relied upon the Due Process Clause of the Fourteenth Amendment. This constitutional tenet is so strong that a conviction, founded in part upon the evidence of an involuntary confession, must be set aside even if the evidence apart from the confession is more than sufficient to uphold a jury's verdict of guilt. C. McCormick, *Evidence*, Sections 147-150 (2d ed. 1972); 3 J. Wigmore, *Evidence*, Sections 821-826 (Chadbourn Rev. 1970); Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 Wash. & Lee L. Rev. 35, 43-51 (1962).

It is clear that the prohibition against the admission of coerced confessions at trial has long held a special position in Anglo-American law. For over ninety years, this Court has held the prohibition in such a special position, that reversal *per se* has been required when a coerced confession has been admitted at trial.

2. A Civilized System Of Justice Must Condemn The Admission Of A Coerced Confession.

- a. In *Rogers v. Richmond*, 365 U.S. 534 (1961), this Court stated:

Our decisions under that Amendment [Fourteenth] have made it clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. (Citations omitted).

365 U.S. 534, 540-541. In *Miller v. Fenton*, 474 U.S. 104 (1985), this Court held that certain interrogation techniques “are so offensive to a civilized system of justice that they must be condemned.” 474 U.S. 104, 109 (emphasis added). This Court further stated:

The Court’s analysis has consistently been animated by the view that “ours is an accusatorial and not an inquisitorial system,” *Rogers v. Richmond* (Citations omitted).

474 U.S. 104, 109-110.

The State of Arizona asks this Court to ignore *stare decisis* by applying harmless error analysis to the admission of a coerced confession. This Court is asked to overrule twenty-four opinions decided under the Due Process Clause. The state has “the heavy burden of persuading the court the changes in society or in the law dictate that the value served by *stare decisis* yield in favor of a greater objective.” *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986).

The state articulates no reason why the principles stated in *Rogers v. Richmond*, *Miller v. Fenton*, and *Rose v. Clark* are no longer valid. Indeed, it should not

seriously be contended that our system of justice should change from an accusatorial one to an inquisitorial one. Nor should it be seriously argued that the use of brutality to obtain a confession is no longer “offensive to a civilized system of justice.” Such conduct “must still be condemned.” *Miller v. Fenton*, 474 U.S. 104, 109.

b. The state, citing *Stein v. New York*, 346 U.S. 156 (1953), asserts that this Court has applied the per se reversal rule to coerced confessions because of the inherent unreliability of such confessions. The state then declares that this Court has applied harmless error analysis to other constitutional errors in which the concern was the “evidentiary value” of the improper evidence. Brief of Petitioner 24-28.

Reliance on *Stein v. New York*, is misplaced. In *Payne v. Arkansas*, this Court held that a “coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.” 356 U.S. 560, 568. This Court then stated, “*Stein v. New York*, is not to the contrary, for in that case this Court did not find that the confession was coerced.” 356 U.S. 560, 568, n. 15 (citation omitted). Since 1936, this Court has consistently stated that coerced confessions are not subject to harmless error analysis under the Due Process Clause. These decisions do not turn alone on the “inherent untrustworthiness” of such confessions.

The Solicitor General contends that *stare decisis* should not apply because the “rules adopted in *Bram* have not survived this Court’s recent decisions on the issues of coerced confessions and harmless error.” Brief for the United States 29. *Bram* followed the common law approach that a coerced confession was inherently untrustworthy. *Bram* did not consider fundamental fair-

ness under the Due Process Clause which has been the basis of this Court's decisions for over fifty years.

In *Spano v. New York*, in addition to the coerced confession, there was an admissible confession and an eyewitness who testified that the defendant had murdered the victim. Despite the overwhelming evidence of guilt, this Court held the conviction had to be reversed. This Court stated:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that *in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.* (Emphasis added.)

360 U.S. 315, 320-321. The state and the Solicitor General chose to ignore this principle.

3. A New Trial Would Not Be Unduly "Inconvenient."

The state contends that harmless error analysis should be applied to the coerced confession in this case, because it would be "inconvenient" to retry the case. Brief of Petitioner 31-32. See also, Brief for the United States 20-21. A similar argument was made in *Vasquez v. Hillery*, 474 U.S. 254 (1986), where this Court condemned racial discrimination in the selection of grand jurors. *Vasquez* rejected the inconvenience argument, stating that granting a new trial, "the only effective remedy for this violation—is not disproportionate to the evil that it seeks to deter." 474 U.S. 254, 262 (footnote omitted).

Vasquez went on to state that "if grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it." 474 U.S. 254, 262. Here, if

no prosecutor chooses to introduce a coerced confession at trial, "no conviction will ever again be lost on account of it." Granting a new trial in this case is not disproportionate to the evil being corrected.

Any inconvenience in this case would be slight. In the first trial, opening statements commenced on December 4, 1985. J.A. 65. The verdict was returned on December 19, 1985. R.T. of Dec. 19, 1985 at 3; Brief of Petitioner 7. A retrial should take considerably less time because there would be no need for the testimony of Sarivola and Agent Ticano.

A week long trial seems a slight inconvenience in a capital case. It is particularly unfair to consider any inconvenience to the prosecutor when he, knowing the confession had been coerced, produced it at trial. The prosecutor had interviewed Sarivola at length on at least three occasions prior to trial. He had also met with Ticano. J.A. 88-93. The prosecutor knew the totality of the circumstances when he moved to admit the confession. He should not now be heard to complain of "inconvenience" caused by his own conduct.

4. Comparison With Other Constitutional Violations Which This Court Has Held Are Not Subject To Harmless Error Analysis.

The Brief for the United States concedes the following constitutional errors are *not* subject to harmless error analysis:

1. Trial before a judge with a financial interest in the outcome. *Rose v. Clark*, 478 U.S. 570, 577-579. See also *Delaware v. Van Arsdall*, 475 U.S. 673, 681-682 (1986); Brief of Petitioner 28.
2. Complete denial of counsel at trial. *Rose v. Clark*, 478 U.S. 570, 577-579. See also *Delaware v. Van Arsdall*, 475 U.S. 673, 681-682.

3. Appointment of a prosecutor with a financial interest in the outcome of a case. *Young v. Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion).
4. Directing a verdict for the prosecution in a criminal trial by jury. *Rose v. Clark*, 478 U.S. 570, 578.
5. Unlawful exclusion of members of the defendant's race from the grand jury. *Vasquez v. Hillery*, 474 U.S. 254.
6. Erroneous denial of a defendant's right to represent himself at trial. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8 (1984).
7. Failure to instruct a jury on the reasonable doubt standard. *Jackson v. Virginia*, 443 U.S. 307, 320 n. 14 (1979).
8. Improper compulsory joint representation of defendants with conflicting interests. *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978).
9. Denial of a public trial. *Waller v. Georgia*, 467 U.S. 39, 49 and n. 9 (1984).

Brief for the United States 21-22. None of the above situations are more serious than admission at trial of a coerced confession.

5. Comparison With Other Constitutional Errors Which This Court Has Held Are Subject To Harmless Error Analysis.

a. Fourth Amendment Violations.

The Solicitor General contends that use of a coerced confession is no more "reprehensible" than violations of the Fourth Amendment which this Court has held are subject to harmless error analysis. Brief of the United States 28. Fourth Amendment violations are not of the

same magnitude. This is illustrated by the fact that coerced confessions are one of the "classic grounds" for writs of habeas corpus. *Teague v. Lane*, 489 U.S. 288 (1989). Fourth Amendment violations are not favored in habeas corpus matters. See *Stone v. Powell*, 428 U.S. 465 (1976).

b. Fifth Amendment Violations.

The Solicitor General states that because *Miranda* violations are subject to harmless error analysis, it is equally appropriate to apply that doctrine to coerced confessions. Brief of the United States 25-26. This contention ignores the fact that coerced confessions are inadmissible under the Due Process Clause. *Miranda* violations are not even of constitutional dimension. *Oregon v. Elstad*, 470 U.S. 298 (1985).

c. Sixth Amendment Violations.

The Solicitor General states that this Court has held Sixth Amendment violations to be subject to harmless error analysis, citing *Satterwhite v. Texas*, 486 U.S. 249 (1988) (denial of counsel during a psychiatric examination). Brief of the United States 26-27. This Court in *Satterwhite*, specifically stated that Sixth Amendment violations that pervade the entire proceeding are not subject to harmless error analysis. This Court cites *Holloway v. Arkansas*, 435 U.S. 475 (1978) (conflict of interest in representation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *White v. Maryland*, 373 U.S. 59 (1963) (absence of counsel from arraignment causing defenses not asserted to be lost). Similarly, a coerced confession corrupts the entire proceeding.

d. The Primacy Of Admission Of A Coerced Confession As Fundamental Error.

The importance of precluding a coerced confession at trial is well illustrated in *Rose v. Lundy*, 455 U.S. 509 (1982). In dissent, Justice Stevens states, "In my opinion claims of constitutional error are not fungible. There are at least four types." 455 U.S. 509, 542-543. Use of coerced confessions at trial and a proceeding pervaded by mob violence are in the highest echelon of constitutional error. 455 U.S. 509, 543-544.

The Solicitor General contends Fourth Amendment violations are no more "reprehensible" than admission of a coerced confession. Brief of the United States 28. Justice Stevens disagreed as he placed the Fourth Amendment violation in *Stone v. Powell* in only the third category of constitutional error.

The Solicitor General argues that *Miranda* violations are comparable to coerced confessions. Brief for the United States 26. As *Miranda* violations are not of constitutional dimension, it would appear they belong in the lowest category of error. The Fifth Amendment violation in *Chapman v. California*, 386 U.S. 18 (1967), cited by the Solicitor General, was placed only in the second rung of error by Justice Stevens.

The Solicitor General also compares the use of coerced confessions to the Sixth Amendment violation in *Harrington v. California*, 395 U.S. 250 (1969). Brief for the United States 25. Justice Stevens specifically cites this case and places it in only the second rung of constitutional error.

CONCLUSION

The judgment of the Supreme Court of Arizona should be affirmed.

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In The
Supreme Court of the United States
October Term, 1989

STATE OF ARIZONA,

Petitioner,

vs.

ORESTE C. FULMINANTE,

Respondent.

On Writ of Certiorari To The
Arizona Supreme Court

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I

FULMINANTE'S CONFESSION WAS NOT COERCED BY SARIVOLA'S PROMISE OF PROTECTION.

A. The Arizona Supreme Court did not apply the correct test in addressing the voluntariness question

Amicus National Association of Criminal Defense Lawyers contends that the Arizona Supreme Court did not rely on the "inducement" rule adopted in *Bram v. United States*, 168 U.S. 532 (1897), and in fact relied on the totality of the circumstances in holding that Fulminante's confession to Anthony Sarivola was involuntary. (NACDL Br. 6-9.) The opinion below, however, belies that claim. Pet. App. A1; *State v. Fulminante*, 161 Ariz. 237, 778 P.2d 602 (1988), *rev'd*, 161 Ariz. 261, 778 P.2d 626 (1989). The Arizona Supreme Court made clear that it was Sarivola's alleged promise of protection that rendered Fulminante's confession involuntary:

After the ruling on the motion to suppress, Sarivola testified that [Fulminante] had been receiving "rough treatment from the guys, and if [Fulminante] would tell the truth, he could be protected." As discussed below this promise rendered the confession involuntary.

Pet. App. A21; 161 Ariz. at 244, 778 P.2d at 609 n.1 (emphasis added). The Arizona Supreme Court also held that this Court's decision in *Bram* required that result:

To be deemed free and voluntary within the meaning of the fifth amendment, a confession must not have been obtained by "any direct or implied promises, however slight, nor by the exertion of any improper influence" (emphasis

added). *Malloy v. Hogan*, 378 U.S. 1, 7 . . . (1964) (quoting *Bram v. United States*, 163 U.S. 532, 543 . . . (1897)).

Pet. App. A23; 161 Ariz. at 244, 778 P.2d at 609 (quoting *State v. Thomas*, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986)). Amicus has misread the decision below. The Arizona Supreme Court quite clearly held that, under this Court's decision in *Bram*, Sarivola's promise rendered Fulminante's confession involuntary. Thus, although the Arizona Supreme Court acknowledged that the totality-of-the-circumstances test was the correct test, it failed to apply the test in Fulminante's case.

B. Fulminante's confession was voluntary under the totality-of-the-circumstances test.

1. The record does not support Fulminante's claim that he was vulnerable to threats of physical violence.

Fulminante claims that the state erroneously argues that he was a hardened criminal whose will could not easily be overborne, and that he knew how to take care of himself in prison. (Resp. Br. 18.) He claims that the state ignores the difficulties he experienced when he was incarcerated for the first time at age 26. (Resp. Br. 19.) None of the alleged difficulties Fulminante experienced during his prior incarcerations warrants a finding that he was especially vulnerable to coercion.¹

When he was 25 years old, Fulminante was sentenced to three years imprisonment following his conviction for

¹ The Arizona Supreme Court made no finding that anything in Fulminante's background or character made him especially vulnerable to coercion.

impairing the morals of a child. (Presentence Report, filed Feb. 5, 1986, at 88, 88h, 88q.) After his arrival at the New Jersey State Prison, Fulminante requested and was placed in protective custody because he felt "threatened." (*Id.* at 88x.)

In September of 1967, Fulminante was transferred to the state hospital after he became violent and broke up his prison cell. (*Id.* at 88x.) Fulminante told Dr. I.F. Bird, the psychiatrist who treated him, that he became violent after ingesting drugs purchased from another inmate. (*Id.* at 88x.) While at the state hospital, Fulminante constantly expressed to Dr. Bird his fear of returning to the state prison. (*Id.* at 88x, 88a1.) Because of this alleged fear, Fulminante was kept in the state hospital until his maximum sentence expired in May of 1968. (*Id.* at 88a1.) The probation officer noted in the presentence report:

Indications are that the defendant's manifestation of bizarre tendencies was merely a ruse so that he would be incarcerated at the State Hospital instead of the State Prison in New Jersey.

(*Id.* at 88k.) The fact that Fulminante was never diagnosed as suffering from a mental illness supports the probation officer's conclusion that Fulminante used a ruse to get himself transferred to the state hospital.²

Instead of refuting the state's contention that Fulminante knew how to take care of himself while in prison, the records from the New Jersey State Hospital support

² Fulminante was first admitted to the New Jersey State Hospital in January of 1966, and was diagnosed as having a sociopathic personality disturbance, sexual deviation. (*Id.* at 88t, 88x.) Dr. Bird agreed with the above diagnosis. (*Id.* at 88u.)

that contention. Those records demonstrate that Fulminante knew that he could request prison officials to place him in protective custody if he either knew or believed that other inmates were going to harm him. The records also demonstrate that Fulminante was not above using a ruse to get himself transferred from the state prison to the state hospital. Even if Fulminante's bizarre behavior in 1967 was not a ruse, by his own admission it was triggered by an adverse reaction to drugs he voluntarily ingested. (*Id.* at 88x.) There is nothing to support Fulminante's claim that he exhibited bizarre behavior because "he could not emotionally handle the isolation of protective custody." (Resp. Br. at 19.)

2. The record does not support Fulminante's claim that he was in fear of the other inmates at Raybrook.

Fulminante claims that he feared being assaulted by other prisoners because of the rumor that he had murdered a child, and he implies that this case is one in which the state used physical coercion to obtain a confession. (Resp. Br. 17-19.) That claim is meritless.³

Fulminante did not testify at the pretrial suppression hearing or at trial, and there is no evidence that he was in fear of any prison inmate at the Raybrook facility. The

³ Fulminante erroneously asserts that Sarivola was paid to obtain Fulminante's confession. The record shows that Sarivola was not being paid for his services when he questioned Fulminante about Jeneane's murder. (J.A. 78-79, 81-82, 87-88, 108-109.)

evidence Fulminante cites, Resp. Br. 4, 19, consists of the 16-year-old New Jersey State Hospital records that were prepared when he was incarcerated in the New Jersey State Prison. There is no evidence that Sarivola, who had befriended Fulminante, had ever threatened Fulminante or had exaggerated the risk of assault on Fulminante. In fact, Fulminante conceded in the trial court that he never indicated that he was in fear of any other inmate at the Raybrook facility, J.A. 10; Fulminante conceded on appeal that, in light of his trial court stipulation, this fact was one of the "pertinent facts" regarding his suppression claim, Appellant's Opening Br. 3; and Fulminante concedes in this Court that "Sarivola did not threaten to personally hurt Fulminante," Resp. Br. 21.

Fulminante also knew that he could be protected by asking prison officials at Raybrook to put him into protective custody. Thus, he knew that he did not need to rely on Sarivola for protection. Further, there is no evidence that Fulminante had been assaulted by another inmate at Raybrook. Accordingly, there is no merit to Fulminante's claim that he was subjected to any actual, immediate, physical abuse or threat by Sarivola or any other prisoner when he confessed to murdering his stepdaughter.

3. The record does not support Fulminante's claim that government agents engaged in misconduct in obtaining his confession.

In response to the state's contention that there was no egregious police misconduct in the present case, Fulminante accuses both Agent Ticano and Sarivola of

reprehensible conduct. Fulminante's allegations of government misconduct are not supported by the record.

(a) Agent Ticano's conduct.

Somewhat surprisingly, Fulminante criticizes the actions of FBI Agent Walter Ticano. Fulminante maintains that Agent Ticano's conduct was offensive to a civilized society since he gave Sarivola, a " 'professional strong arm man [,]' substantial financial and other incentives to 'shake down' his prey for information." (Resp. Br. 20.) There is nothing to that claim – which Fulminante now makes for the first time – except inflated rhetoric. Agent Ticano did not "exert pressure on Sarivola to obtain a confession," Resp. Br. 21, as Fulminante now claims. In truth, Agent Ticano simply told Sarivola " 'to find out more about it' . . . before I can act upon it, or words to that effect," as Fulminante conceded in the trial court. (J.A. 10.) Agent Ticano would have been remiss in his duty as an officer of the law had he failed to attempt to obtain further information that would either verify the rumor or prove it false.

There is nothing unconstitutional (or unconscionable) about using members of organized crime as government informants. As the Court has recognized, "[a]dmissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (citations omitted). The use of informants or other stratagems in the discovery of evidence of a crime has been accepted by this Court as a

legitimate investigative technique for nearly a century.⁴ As Judge Learned Hand once wrote: "Courts have countenanced the use of informers from time immemorial [...] * * * Entrapment excluded, * * * decoys and other deception are always permissible." *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1950), *aff'd on other grounds*, 341 U.S. 494 (1951).

(b) Sarivola's conduct.

Fulminante insinuates that, since Sarivola had been convicted of a crime involving the use or threat of violence, he used threats or force on targeted citizens during the period of time that he acted as an informant for the FBI.—There is nothing in the record to support such a claim. In fact, Sarivola himself was the victim of an attempted assassination during the time he was working for the FBI as an informant. (J.A. 89, 94.)

Fulminante, however, claims that Sarivola's conduct was extremely coercive because he "gave Fulminante the choice of physical harm at the hands of hostile inmates or

⁴ E.g., *Grimm v. United States*, 156 U.S. 604, 610-611 (1895); *Goode v. United States*, 159 U.S. 663, 669 (1895); *Rosen v. United States*, 161 U.S. 29, 42 (1896); *Andrews v. United States*, 162 U.S. 420, 423 (1896); *Price v. United States*, 165 U.S. 311, 315 (1897); *Sorrells v. United States*, 287 U.S. 435 (1932); *Lopez v. United States*, 373 U.S. 427, 450 (1963); *Lewis v. United States*, 385 U.S. 206, 211 (1966); *Hoffa v. United States*, 385 U.S. 293, 304 (1966); *United States v. White*, 401 U.S. 745 (1971); *Procunier v. Atchley*, 400 U.S. 446 (1971); *United States v. Russell*, 411 U.S. 423 (1973); *Hampton v. United States*, 425 U.S. 484 (1976); *Weatherford v. Bursey*, 429 U.S. 545 (1977); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Illinois v. Perkins*, No. 88-1972 (June 4, 1990).

receipt of protection in exchange for a confession." (Resp. Br. 13.) If those were the only two choices available to Fulminante, his claim that Sarivola's promise of protection was coercive would be more persuasive. Fulminante, though, had a third choice available to him. He could have done the same thing that he did the first time he went to prison. He could have requested prison officials to place him in protective custody. There is nothing to indicate that Raybrook prison officials would have refused such a request.

C. Fulminante's reliance on *Payne v. Arkansas* is misplaced.

Respondent and the NACDL claim that this case is not materially different from *Payne v. Arkansas*, 356 U.S. 560 (1958). That claim is in error.

The undisputed evidence in *Payne* showed that:

[P]etitioner, a mentally dull 19-year-old youth, (1) was arrested [for murder] without a warrant, (2) was denied a hearing before a magistrate at which he would have been advised of his right to remain silent and of his right to counsel as required by Arkansas statutes, (3) was not advised of his right to remain silent or of his right to counsel, (4) was held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call, (5) was denied food for long periods, and, finally, (6) was told by the chief of police "that there would be 30 or 40 people there in a few minutes that wanted to get him," which

statement created such fear in petitioner as immediately produced the "confession."

356 U.S. at 567. Not surprisingly, this Court held that Payne's confession was coerced, "particularly [by] the culminating threat of mob violence." *Id.* at 567.

By contrast, the undisputed evidence in Fulminante's case shows that Fulminante's friend, Sarivola, offered to protect Fulminante from a potential assault by other prisoners, who had been giving him a rough time. The offer was made during a casual conversation between the two men while they were taking a stroll around the prison grounds.

Since Fulminante was unaware that Sarivola was an FBI informant, there existed none of "the danger of coercion result[ing] from the interaction of custody and official interrogation," that existed in *Payne*. *Illinois v. Perkins*, No. 88-1972, slip. op. at 6. Unlike the youth in *Payne*, who was totally dependent upon his jail custodians to protect him from mob violence, Fulminante was not dependent on Sarivola for protection or for anything else. Unlike the youth in *Payne*, who feared the mob outside the jail, Fulminante never expressed fear of the other inmates. Further, if he did fear the other inmates, he had an option that Payne did not have – Fulminante could have asked prison officials for protection.

Fulminante, nevertheless, argues that his case is indistinguishable from *Payne* because, like the defendant in *Payne*, he initially denied his guilt and only confessed when he was promised protection. (Resp. Br. 22.) The fact that Fulminante confessed a short time after Sarivola promised to protect him is only one factor that must be

considered in determining if the promise coerced his confession. Further, the preceding factor is virtually the only similarity between the two cases.

The defendant in *Payne* testified that his confession to the police chief did not contain the truth, and that he confessed because he was "more than afraid" that the police chief would "let [the mob] in." 356 U.S. at 566. Fulminante, on the other hand, never testified that he falsely confessed in order to obtain Sarivola's protection because of his fear. This Court has noted that: "Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the court has assumed will weaken the suspect's will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist." *Illinois v. Perkins*, No. 88-1972, slip. op. at 6. Clearly, the threats of Payne's captors to turn him over to a mob overbore his will and wrung from him an involuntary confession. By contrast, Fulminante was not subjected to similar coercive tactics by persons who appeared to control his fate. Thus, his will was not overborne and his confession to Sarivola was voluntary.

II

HARMLESS-ERROR ANALYSIS SHOULD APPLY TO THE ERRONEOUS ADMISSION OF AN INVOLUNTARY CONFESSION.

Bram held that the erroneous admission of a defendant's confession requires reversal in every case. Although Fulminante and the NACDL endorse that rule, they make no attempt to defend the reasoning of the *Bram*

decision. Instead, their principal defense of that rule is that stare decisis considerations militate against overruling it. (Resp. Br. 24-27; NACDL Br. 18-19.) That argument is wholly unpersuasive.

Stare decisis is a venerable legal doctrine and serves valuable purposes, but the perpetuation of outdated and irrational legal rules is not among them. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

Bram was decided 70 years before the court held in *Chapman v. California*, 386 U.S. 18 (1967), that constitutional errors do not require reversal in every case. The pre-*Chapman* decisions cited by Fulminante and amicus applying *Bram* are therefore beside the point. Moreover, this Court has never re-examined *Bram* since its decision in *Chapman*.

Neither *Chapman* nor the post-*Chapman* decisions cited by Fulminante addressed this question. Each one involved a different harmless-error question, see *Chapman*, *supra* (comment on defendant's silence at trial); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction with an erroneous rebuttable presumption), or did not involve a harmless-error issue at all, see *Lego v. Twomey*, 404 U.S. 477 (1972) (whether a State must prove beyond a reasonable doubt that the defendant's confession is voluntary); *Mincey v. Arizona*, 437 U.S. 385 (1978) (whether the defendant's confession was coerced); *New Jersey v. Portash*, 440

U.S. 450 (1979) (whether testimony given under a grant of use immunity may be used to impeach the defendant at trial).⁵ Under these circumstances, stare decisis is, at best, a weak basis for refusing to reconsider *Bram*.

There is no good reason to have a per se rule of reversal applicable only to the erroneous admission of an involuntary confession.⁶ One of the most common contemporary applications of the harmless-error doctrine is to the erroneous admission of evidence. This Court has frequently held that the erroneous admission of evidence can be harmless. *Satterwhite v. Texas*, 486 U.S. 249 (1988) (statements of the defendant); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (identification evidence); *Brown v. United States*, 411 U.S. 223, 231-232 (1973) (out-of-court statement of a nontestifying co-defendant); *Chambers v. Maroney*, 399

⁵ Fulminante and amicus also cite the plurality opinion in *Connecticut v. Johnson*, 460 U.S. 73, 81 (1983), as another case in which the Court allegedly reaffirmed *Bram*. That argument is thrice flawed: only a plurality referred to this point; the reference was dictum since *Johnson* involved an entirely different question (a jury instruction containing an erroneous rebuttable presumption); and in any event *Johnson* was overruled by *Rose v. Clark*, 478 U.S. 570 (1986).

⁶ Amicus NACDL claims that the United States conceded in its amicus brief that adoption of a rule of automatic reversal is "reasonable and efficient" because a confession is "extremely powerful evidence that is likely to be prejudicial in most cases." (NACDL Br. 24.) The NACDL has misrepresented the argument made by the United States by omitting a key phrase from the sentence quoted and by taking the sentence out of context. The United States did not make the concession the NACDL claims it made, and, in fact, argued that a rule of automatic reversal is neither reasonable nor efficient. (United States Br. 24.)

U.S. 42, 52-53 (1970) (physical evidence). Moreover, the Court has twice specifically held that harmless-error analysis applies to the erroneous admission of a defendant's statements obtained from him in violation of his right to counsel under the sixth-amendment counsel clause. *Satterwhite v. Texas*, 486 U.S. at 256; *Milton v. Wainwright*, 407 U.S. 371 (1972). The Court also recently remanded a case to the lower courts for them to determine whether the admission of a defendant's statements obtained in violation of *Miranda* was harmless. *Pennsylvania v. Muniz*, No. 89-213 (June 18, 1990), slip op. 22 n.22; *id.* slip op. 3 (opinion of Rehnquist, C.J.) (same). Accordingly, the *Bram* rule stands alone, because in no other instance has this Court declined to apply harmless-error analysis to the erroneous admission of evidence.

Fulminante and the NACDL contend that the "fundamental nature of the right involved" renders it immune from harmless-error analysis. (NACDL Br. 21; *see also* Resp. Br. 25-26.) But all constitutional rights are in some sense "fundamental"; that argument does not distinguish this right from any other. In addition, the rule excluding a defendant's involuntary confession is ultimately a trial right of the defendant. As the court explained in *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1060 (1990) (citation omitted), "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." Since the rule here is ultimately a constitutional rule of evidence, it should be treated in the same manner

as other such rules, all of which are subject to harmless-error analysis.

Amicus NACDL contends that a harmless-error analysis would encourage the police to coerce confessions from suspects. (NACDL Br. 21-22.) A similar argument could be made in any harmless-error case. Moreover, that argument does not distinguish fifth-amendment violations from fourth or sixth-amendment violations, to which the Court has applied the harmless-error doctrine. See *Chambers v. Maroney*, 399 U.S. at 52-53; *Satterwhite v. Texas*, 486 U.S. at 256; *Milton v. Wainwright*, 407 U.S. at 372-373, 378-379. In any event, amicus' argument is implausible given the heavy burden (beyond a reasonable doubt) that the state must overcome to prove that an error is harmless. Cf. *Murray v. United States*, 487 U.S. 533, 539-540 (1988) (rejecting similar argument in the context of the fourth-amendment exclusionary rule).

III

THE ADMISSION OF FULMINANTE'S CONFESSION TO ANTHONY SARIVOLA WAS HARMLESS BEYOND A REASONABLE DOUBT.

Applying the *Chapman* standard, the Arizona Supreme Court found that the admission of Fulminante's confession to Anthony Sarivola was harmless beyond a reasonable doubt, for several reasons: Fulminante's later statement to Donna Sarivola was not the "fruit of the poisonous tree" and therefore was admissible, Pet. App. A24-25; 161 Ariz. at 244, 778 P.2d at 609; Fulminante's confession to Anthony Sarivola "was cumulative of the admissible second confession" to Donna Sarivola; and "due to the overwhelming evidence adduced from the

second confession, if there had not been a first confession, the jury would still have had the same basic evidence to convict [Fulminante]," Pet. App. A29-30; 161 Ariz. at 246, 778 P.2d at 611. That determination does not warrant reconsideration by this Court. See *Francis v. Franklin*, 471 U.S. 307, 326 n.10 (1985) ("The primary task of this Court upon review of a harmless-error determination by the court of appeals is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision.")

A. There was overwhelming evidence of Fulminante's guilt, even without his confession to Sarivola.

Fulminante claims that the Arizona Supreme Court erred in holding that, even after the confession to Sarivola is discounted, there is still overwhelming evidence of his guilt. That holding is correct.

Fulminante told Donna Sarivola that he took his step-daughter out into the desert where he raped, beat, and choked her. (J.A. 168.) After forcing her to beg for her life, he killed her by shooting her two or three times in the head. (J.A. 168-69.) The evidence showed that the victim's body was found in the desert. A ligature was tied around her neck. She had died from two gunshot wounds to the head. Pet. App. A6-7; *State v. Fulminante*, 161 Ariz. at 240, 778 P.2d at 605. The Arizona Supreme Court correctly determined that the physical evidence fully corroborated Fulminante's confession to Donna Sarivola.

1. Claim that Donna Sarivola's testimony is highly suspect.

Fulminante argues that there was not overwhelming evidence of his guilt because Donna Sarivola's testimony

regarding his confession is "highly suspect." For example, he argues that Donna Sarivola's testimony is suspect because she testified that, a short time after they met, Fulminante confessed to a brutal murder in response to her casual inquiry why he was going to Vince DeMarco's house. While it may be somewhat unusual for a murderer to confess to a new acquaintance in response to a casual question, it was not that unusual for Fulminante to freely discuss the murder of his stepdaughter in the presence of Sarivola. As Fulminante argued in the Arizona Supreme Court:

It should be noted that the confession to Donna was made in the presence of Anthony. This is the classic case of letting "the cat out of the bag." If Fulminante had already confessed to Anthony, it would have made little sense to change his story in Anthony's presence, in response to Donna's question as to why Fulminante was not going to visit his own relatives.

(Motion for Reconsideration filed Aug. 31, 1988.)

2. Claim that Fulminante's confession to Donna Sarivola was contradicted by the physical evidence.

Fulminante claims that the physical evidence contradicted his confession to Donna Sarivola. He points out that the medical examiner testified that there was no evidence that the victim was beaten or that she was sexually assaulted. Because the victim's body was badly decomposed by the time it was found, it was impossible to tell whether Fulminante had beaten or sexually assaulted his stepdaughter prior to killing her. Although tests for spermatozoa and seminal fluid were negative,

the medical examiner testified that rarely were spermatozoa and seminal fluid found in a decomposing female body. (J.A. 188.) Further, Fulminante's confession regarding the sexual assault was consistent with the evidence found at the murder scene. The victim's jeans had been unzipped and pulled down over her buttocks. [R.T. of Dec. 9, 1985 (Trial) Vol. 4 at 20-21.] While inconclusive, the physical evidence did not contradict Fulminante's admissions regarding the sexual assault of the victim.

Fulminante argues that there was no evidence to corroborate his admission to Donna Sarivola that he choked the victim prior to shooting her. A ligature⁷ had been tied around the victim's neck prior to her death. The medical examiner testified that the ligature did not contribute to the victim's death, but that it could have been used to effect non-fatal choking of the victim. [J.A. 187; R.T. of Dec. 16, 1986 (Trial) Vol. 9 at 63.] The ligature found around the victim's neck corroborates Fulminante's admission that he choked her. The fact that the ligature did not contribute to the victim's death does not contradict Fulminante's admission that the choking occurred.

B. No unduly prejudicial evidence was admitted in connection with Fulminante's confession to Sarivola.

As a second ground in support of his claim that the erroneous admission of his confession to Sarivola did not

⁷ The ligature was a piece of old worn towel. [R.T. of Dec. 6, 1986 (Trial) Vol. 4 at 24-26.] Mary Hunt testified that it looked like one of the Fulminantes' old worn towels. [R.T. of Dec. 17, 1986 (Trial) Vol. 10 at 21-22.]

constitute harmless error, Fulminante argues that extremely prejudicial evidence was admitted solely in conjunction with his confession to Sarivola. The state disagrees that the evidence in question was unfairly prejudicial, or that it would necessarily have been precluded if the confession to Sarivola had not been admitted.

1. Fulminante's prior convictions and incarcerations.

Even if the trial court had excluded Fulminante's confession to Sarivola, evidence regarding Sarivola's relationship with Fulminante, and the conversations the two men had together while in prison was admissible under Arizona law in order to place Fulminante's later conversation with Donna in context. *See* Rule 404(b), Ariz. R. Evid. (proof of defendant's other bad acts admissible for purposes other than showing action in conformity therewith); *State v. Chaney*, 141 Ariz. 295, 686 P.2d 1265 (1984) (evidence of defendant's prior acts of burglary and theft properly admitted in murder prosecution to make events more comprehensible to jury); *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983), *cert. denied*, 467 U.S. 1220 (1984) (evidence in murder prosecution of plan of defendant and coconspirators to commit another murder properly admitted to show motive or to complete the story for the jury).

2. Fulminante's reputation for being untruthful.

Fulminante did not object at trial to the admission of evidence that he had a poor reputation in prison for

truthfulness. Moreover, the Arizona Supreme Court specifically found that the alleged error of defense counsel in failing to object to the admission of the credibility evidence was nonprejudicial, as the evidence did not affect the result of the trial. Pet. App. A93-94; *State v. Fulminante*, 161 Ariz. at 260, 778 P.2d at 625.

3. Evidence of Sarivola's reputation for truthfulness and as an organized crime figure.

Fulminante claims that he was prejudiced because evidence regarding Sarivola's reputation for truthfulness, and evidence of his knowing association with Sarivola, an organized crime figure, was introduced at trial. Since Fulminante attacked Sarivola's credibility, evidence of Sarivola's reputation for truthfulness was properly admitted pursuant to Rule 608(a), Arizona Rules of Evidence. While evidence of Sarivola's organized crime connections may not have been relevant if the confession to Sarivola was inadmissible, that evidence reflected on Sarivola's character, not on that of Fulminante. In view of the overwhelming evidence of Fulminante's guilt, the evidence of which Fulminante complains could not possibly have affected the verdict. Fulminante has not shown that he was prejudiced by admission of the evidence in question.

The Arizona Supreme Court's inquiry whether the admission of Fulminante's confession to Sarivola was harmless error was thorough. Further, that court clearly set forth the basis for its decision that his second confession to Donna Sarivola "established his guilt." Pet. App. A29; *State v. Fulminante*, 161 Ariz. at 245-46, 778 P.2d

610-11. This Court should reject Fulminante's claim that the Arizona Supreme Court erred in its initial finding of harmless error.

CONCLUSION

This Court should reverse the Arizona Supreme Court's judgment.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ARIZONA, PETITIONER

v.

ORESTE C. FULMINANTE

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARIZONA

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTIONS PRESENTED

1. Whether respondent's confession was involuntary because respondent made the statement in response to an offer by an undercover informant to protect respondent from other inmates at the prison where respondent and the informant were incarcerated.

2. Whether the admission of a defendant's involuntary confession can ever be harmless error.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-839

STATE OF ARIZONA, PETITIONER

v.

ORESTE C. FULMINANTE

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The use of an informant to obtain information from a suspect is a valuable law enforcement tool, even when the suspect is incarcerated. Federal informants frequently obtain statements from inmates that are used in prosecutions of those inmates for crimes committed while they were in prison or earlier. The United States also prosecutes cases referred from state or local authorities in which confessions were obtained from incarcerated suspects. The Court's resolution of the first question in this case will affect the circumstances under which the federal government may use this law enforcement tool.

The United States also has an interest in the Court's interpretation of the harmless error doctrine. Questions of harmless error arise constantly in federal criminal cases, and the Court's resolution of the second question in this case will affect the role of the harmless error doctrine with respect to an entire class of errors—those

involving the admission of defendants' statements that are subsequently held to be involuntary.

STATEMENT

1. On September 14, 1982, respondent telephoned the Mesa, Arizona, Police Department to report the disappearance of his 11-year-old stepdaughter, Jeneane Hunt. Jeneane's body was discovered in the desert two days later. She had been shot in the head at close range with a large-caliber weapon. She also had a ligature tied around her neck that could have been used to choke her. Pet. App. A6-A7.

Because of inconsistencies in respondent's statements to the police and his recent purchase of an interchangeable barrel for a .357 revolver, respondent became a suspect in the murder investigation. No charges were filed, however, and respondent left the State. He was later convicted of the federal crime of possession of a firearm by a felon and was incarcerated in the federal correctional facility at Ray Brook, New York. While at the Ray Brook facility, respondent befriended Anthony Sarivola, a former associate of the Columbo organized crime family who was serving a 60-day sentence for extortion. Unbeknownst to respondent, Sarivola had become an informant for the Federal Bureau of Investigation, but he continued to pose as an active member of organized crime while in prison. J.A. 134-137; Pet. App. A8-A10.

After hearing a rumor that respondent was suspected of murdering a child in Arizona, Sarivola spoke with respondent about the rumor. Respondent denied committing the murder. Sarivola told his FBI contact about the rumor, and the agent told Sarivola to learn more about it. J.A. 80-82.

One evening, while Sarivola and respondent were taking a walk in the prison yard, Sarivola spoke with respondent, who was "starting to get some rough treatment and whatnot from the guys" concerning the rumor. J.A. 83. Sarivola offered to protect respondent from the other inmates, but he told respondent, "'You have to tell me about it,' you know. I mean, in other words, 'For me

to give you any help.' " *Ibid.* Respondent then admitted to Sarivola that he had sexually assaulted and choked Jeneane, that he had forced her to beg for her life, and that he had killed her. J.A. 83-85, 138, 147-148; Pet. App. A10.

Sarivola was released from prison in November 1983; respondent was released six months later. Upon respondent's release, Sarivola and his fiancée, Donna, met respondent at a bus terminal. Donna asked respondent if he wanted to see any relatives or friends. Respondent said that he could not return to his home since he had killed "a little girl" in Arizona. Respondent added that he had first sexually assaulted and choked his victim, and had forced her to beg for her life. J.A. 166-169, 177-178; Pet. App. A10-A11.

2. Before trial, respondent moved to suppress his statements. In order to avoid having to testify at an evidentiary hearing, respondent adopted the statement of facts contained in the State's opposition to his suppression motion. J.A. 30-31.¹ The trial court denied the mo-

¹ The State described the facts as follows:

It is a fact that Anthony Sarivola was at all times pertinent to this case a paid confidential informant for the F.B.I. He was an informant in matters that related to organized crime in the Brooklyn, New York City area. It is also true that while incarcerated in Raybrook Prison in upstate New York various rumors reached Mr. Sarivola that [respondent] had killed his step-daughter in Arizona.

Initially these were rumors and initially the truth of the rumors was denied by [respondent]. It is also true that Mr. Sarivola passed the rumors on to the F.B.I. Upon being informed of those rumors, the F.B.I. agent, Mr. Walter Ticano, supposedly said "... that's just a rumor, you'll have to find out more about it ... before I can act upon it," or words to that effect. The witness, Anthony Sarivola, went back to [respondent] and asked him if these rumors were in fact true, adding that he, Mr. Sarivola, might be in a position to help protect [respondent] from physical recriminations in prison, but that [respondent] must tell him the truth. Thereupon [respondent] told Mr. Sarivola that he, in fact, had killed his step-daughter in Arizona, and gave him substantial details about how he killed the child. At no time did [respondent] indicate that

tion to suppress, stating that "[t]he Court does not find that the statements allegedly made in this case were the result of promises, threats or coercion by the Government or any of its agents." J.A. 44. Both statements were admitted at trial.

3. The Arizona Supreme Court initially affirmed respondent's conviction, although it held that respondent's confession to Anthony Sarivola should not have been admitted. Pet. App. A1-A95. Based in part on this Court's opinion in *Bram v. United States*, 168 U.S. 532, 543 (1897), the court adopted the rule that a confession is involuntary if it was "obtained by 'any direct or implied promises, however slight, [or] by the exertion of any improper influence.'" Pet. App. A23. Applying that principle, the court held that respondent's statement to Sarivola was involuntary since it was given in response to Sarivola's promise of protection. *Id.* at A21 n.1, A22-A24. Nonetheless, the court held that the admission of the statement to Anthony Sarivola was harmless beyond a reasonable doubt. *Id.* at A24-A30. The court reasoned that respondent's subsequent statement to Sarivola's fiancée was not the "fruit of the poisonous tree" and was admissible, *id.* at A24-A25, that "the invalid first confession was cumulative of the admissible second confession," *id.* at A29-A30, and that "due to the overwhelming evidence adduced from the second confession, if there had not been a first confession, the jury would still have had the same basic evidence to convict [respondent]," *id.* at A30.

4. Respondent moved for reconsideration, and the court granted his motion. Pet. App. B1. In a supplemental opinion, the court held, over one dissent, that under this Court's precedents, the admission of a defendant's involuntary confession cannot be harmless. *Id.* at C4-C10.

he was in fear of other inmates[,] nor did he ever seek Mr. Sarivola's "protection".

J.A. 10. Respondent conceded on appeal that these were the "pertinent facts" in light of his stipulation in the trial court. Appellant's Opening Br. 3.

Therefore, the court held, "until and unless the Supreme Court changes the law, we must order [respondent] retried without the use of the coerced confession." *Id.* at C10.

SUMMARY OF ARGUMENT

In reversing respondent's conviction, the Arizona Supreme Court relied on two propositions adopted by this Court in *Bram v. United States*, 168 U.S. 532 (1897): first, a confession is involuntary if it is the product of any governmental inducement, even a slight one, made to a suspect to encourage him to confess; second, the admission of a defendant's involuntary confession requires a reversal of his conviction in every case. The first proposition, however, is no longer an accurate statement of the law. This Court's subsequent decisions have not applied such a per se rule. Instead, the Court has held that the totality of the circumstances must be considered in deciding whether a suspect's confession is involuntary. The second proposition, while never reconsidered by this Court, is no longer valid in light of subsequent developments in the harmless error doctrine.

1. A suspect's confession is considered involuntary if, due to coercive government misconduct, his free will has been overborne. In cases not involving violence or the threat of violence, a confession is deemed voluntary unless the police conduct is considered unacceptably coercive under all the circumstances. Most courts have declined to read *Bram* literally and have rejected the per se rule under which a confession is considered involuntary if it is the product of any governmental inducement, no matter how slight.

When a confession is made in response to an inducement, as opposed to some form of coercion, there is seldom any danger that the confession will be unreliable. Furthermore, inducements ordinarily cannot be said to deprive the suspect of his freedom to decide whether to confess. Suspects are typically capable of rationally weighing the advantages and disadvantages of offers of leniency made in exchange for confessions. Moreover,

except in the most extreme cases, offering an inducement in exchange for a confession and cooperation by the suspect is not regarded as unconscionable government conduct. For these reasons, the Court should hold that the per se rule in *Bram* barring confessions based on any inducement at all is no longer good law.

Under the proper standard, respondent's confession was plainly voluntary. He spoke to Sarivola, with whom he was on friendly terms, during a casual conversation while they were taking an evening walk. Sarivola did not use or threaten violence against respondent. In fact, Sarivola offered to use his influence to protect respondent from others. Moreover, Sarivola did not concoct the rumors of respondent's involvement in the murder of a child in order to induce respondent to confess to the murder. Respondent was therefore not "compelled" to admit his guilt in any sense that the law recognizes.

2. *Bram* adopted a rule of automatic reversal during a time when any trial error required reversal of a defendant's conviction. Since then, Congress and every State have adopted harmless error laws, and the Court has repeatedly held that constitutional errors can be harmless in a proper case. The rationale of *Bram* is also no longer valid. Although *Bram* saw a "contradiction" in the assertion that evidence can be both "probative" and "harmless," there is no such contradiction under modern principles of appellate review. An appellate court's ruling that the erroneous admission of evidence was harmless means only that its admission did not have a material effect on the verdict, not that the evidence had no probative force and was therefore irrelevant.

The erroneous admission of a defendant's confession also shares none of the attributes of the errors that the Court has deemed prejudicial per se. The improper admission of evidence does not affect the composition of the record; it therefore does not require an appellate court to make a difficult inquiry concerning what might have happened if the proceedings had taken a very different course. Moreover, the Court has held that the admission of a defendant's statements obtained in violation of the

Sixth Amendment can be harmless, *Satterwhite v. Texas*, 486 U.S. 249 (1988); *Milton v. Wainwright*, 407 U.S. 371 (1972), and the lower courts have uniformly ruled that the admission of a defendant's statements obtained in violation of *Miranda* also can be harmless. The error here is not materially different from the errors in those cases. Finally, there is no reason to adopt a rule of automatic reversal simply because the violation is the product of government misconduct. This Court has declined to adopt that rule for Fourth and Sixth Amendment violations, even though violations of those rights also involve government misconduct, and even though the need to deter those violations is just as great as in the case of violations of the Fifth Amendment.

ARGUMENT

I. RESPONDENT'S CONFESSION WAS PROPERLY ADMITTED AT TRIAL

A. The Constitution Bars The Admission Of A Defendant's Statements Only If Coercive Government Misconduct Overbears The Defendant's Free Will

1. A suspect's confession is involuntary if, due to coercive government misconduct, his "will has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.)); *Colorado v. Connelly*, 479 U.S. 157, 163-167 (1986). In making that determination, courts must assess "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth*, 412 U.S. at 226. The relevant characteristics of the suspect are ones that affect his vulnerability to pressure, such as his age, intelligence, education, criminal experience, and physical condition.² The relevant details of the

² See, e.g., *Payne v. Arkansas*, 356 U.S. 560, 567 (1958); *Fikes v. Alabama*, 352 U.S. 191, 196 (1957); *Leyra v. Denno*, 347 U.S. 556,

interrogation relate to the government's conduct and the conditions under which the suspect was questioned, including the site and length of interrogation or detention, whether counsel was made available, and whether the suspect was advised of his constitutional rights.³

Some police conduct, such as extraction of a confession through "beatings and other forms of physical and psychological torture," is so "inherently coercive" that it precludes a voluntary confession regardless of the circumstances. *Miller v. Fenton*, 474 U.S. 104, 109, 110 (1985); *Stein v. New York*, 346 U.S. 156, 182 (1953). Other interrogation techniques are considered improper only if, "in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." *Miller v. Fenton*, 474 U.S. at 110.

2. The Arizona Supreme Court recited the "totality of the circumstances" test, Pet. App. A20, but did not apply it. Instead, it held that respondent's statements to Anthony Sarivola were involuntary because respondent uttered those statements in response to Sarivola's offer of protection. In so ruling, the court relied on a passage from *Bram v. United States*, 168 U.S. 532, 542-543 (1897), in which this Court wrote that a statement is involuntary if it is obtained by "any direct or implied promises, however slight, [or] by the exertion of any improper influence." The Arizona court's analysis is wrong because the language from *Bram* on which it was based is no longer an accurate statement of the law.

a. In *Bram*, the defendant, a sailor, was arrested and jailed in Halifax, Nova Scotia, for a murder committed on the high seas. He was brought to the office of a police detective, where, alone with the detective and stripped of his clothing, he was interrogated. 168 U.S. at 534-536,

559 (1954); *Stein v. New York*, 346 U.S. 156, 185 (1953); *Haley v. Ohio*, 332 U.S. 596, 599-601 (1948).

³ See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Davis v. North Carolina*, 384 U.S. 737, 740-741 (1966); *Miranda v. Arizona*, 384 U.S. 436, 469 (1966); *Chambers v. Florida*, 309 U.S. 227, 239-240 (1940).

561-562. During questioning, the detective told Bram that another sailor had reported that, from his position at the wheel of the vessel, he saw Bram commit the murder. Bram responded: "[H]e could not see me from there." *Id.* at 539, 562. The detective also advised Bram that "[i]f you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." *Id.* at 539. Bram then said that the other sailor was the murderer. *Ibid.*

This Court held that Bram's first inculpatory statement was involuntary. 168 U.S. at 562-564. In so ruling, the Court considered the totality of the circumstances, stating: "Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who in law could be considered a free agent." *Id.* at 563-564. The Court then concluded that the detective's remark that Bram should identify his accomplice and not shoulder the entire blame for the murder "imported a suggestion of some benefit as to the crime and its punishment as arising from making a statement." *Id.* at 564-565. The Court held that this suggestion automatically rendered the statement involuntary. In reaching that conclusion, the Court relied on and quoted from a contemporary criminal law treatise: "a confession, in order to be admissible, must be free and voluntary: that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." 168 U.S. at 542-543 (quoting 3 *Russell on Crimes* 478 (6th ed. 1896)).

Taken literally, the quoted passage from *Bram* would bar any confession resulting from any promise or inducement by government officials, regardless of the nature of the inducement or a defendant's ability to resist it. A literal reading of that passage is at odds with numerous

later decisions by this Court using a totality-of-the-circumstances approach and abjuring hard-and-fast rules of involuntariness where the fact or threat of violence is not present. To be sure, the Court has occasionally quoted the passage in *Bram* with approval.⁴ But when confronted with confessions obtained as a result of government threats or promises, the Court has not applied the strict rule in *Bram*, but instead has applied the totality-of-the-circumstances test.⁵ The Court's two most recent decisions citing the passage from *Bram* show that the Court no longer adheres to the test suggested by that passage.

In *Brady v. United States*, 397 U.S. 742 (1970), the Court rejected the claim that a defendant's guilty plea to kidnapping, made with the advice of counsel, was involuntary because the defendant entered the plea in order to avoid the possibility of the death penalty, which was later held unconstitutional. 397 U.S. at 749-755. The Court held that *Bram* did not require a contrary result. *Id.* at 753-755. The Court described *Bram* as dealing with "a confession given by a defendant in custody, alone and unrepresented by counsel," *id.* at 754, and read *Bram* to hold only that "[i]n such circumstances, even a mild promise of leniency was sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." *Ibid.* (emphasis added). The Court read *Bram* not to foreclose the possibility that

⁴ See, e.g., *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 347 (1963); *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

⁵ See *Haynes v. Washington*, 373 U.S. 503, 513-514 (1963) (threat of continued incommunicado detention and promise of communication with and access to family); *Lynum v. Illinois*, 372 U.S. 528, 531, 534 (1963) (promise of leniency and threat that defendant's children would be taken from her); *Payne v. Arkansas*, 356 U.S. at 567 (threat to admit lynch mob into jail); *Leyra v. Denno*, 347 U.S. at 560-561 (promise of leniency); *Stein v. New York*, 346 U.S. at 167, 184-186 (promises that defendant's father would be released and that his brother would not be prosecuted).

the coercive impact of a promise of leniency could be "dissipated by the presence and advice of counsel." *Ibid.* Thus, far from viewing *Bram* as establishing a flat rule excluding all confessions resulting from government promises or inducements, *Brady* read *Bram* as turning on the conduct of the police in creating pressure and the suspect's capacity to resist that pressure under the particular facts of that case.

In *Hutto v. Ross*, 429 U.S. 28 (1976), the defendant claimed that his confession was involuntary on the ground that he would not have made it but for his plea bargain, from which he subsequently withdrew. The Court rejected that claim because the plea bargain did not require the defendant to confess. 429 U.S. at 30. Despite the broad language of the *Bram* rule, which the Court quoted, the Court in *Hutto* stated that "causation in [the "but-for"] sense has never been the test of voluntariness." *Ibid.* *Hutto* thus stands for the principle that "it does not matter that the accused confessed because of [a] promise, so long as the promise did not overbear his will." *Miller v. Fenton*, 796 F.2d 598, 608 (3d Cir.), cert. denied, 479 U.S. 989 (1986).⁶

Mindful of this Court's decisions, the federal courts of appeals also have not read *Bram* literally, since doing so "would be in conflict with the well-established rule that the totality of the circumstances must be considered in determining whether the confession is the result of overbearing by the police authorities." *Tippitt v. Lockhart*, 859 F.2d 595, 597 (8th Cir. 1988), cert. denied, 109

⁶ As the Third Circuit noted in *Miller*, while *Brady* and *Hutto* quoted the passage from *Bram*, those cases did not interpret it "as a *per se* proscription against promises made during interrogation." Instead, the Court has interpreted "the words 'obtained by . . . promises' in the *Bram* test * * * to mean 'obtained because the suspect's will overborne by . . . promises.'" 796 F.2d at 608. Under that interpretation, "promises do not trigger an analysis different from the totality of the circumstances test." *Ibid.* See also *Haynes v. Washington*, 373 U.S. at 513 (after citing *Bram*, Court stated, "of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances."

S. Ct. 2452 (1989). Some courts, in cases involving confessions obtained as a result of government promises, have explicitly held that *Bram* did not impose a per se rule.⁷ Other courts, after citing *Bram*, have applied a totality-of-the-circumstances test, or have indicated that a confession is not necessarily coerced because it was made in response to a government promise.⁸ In essence, the circuits have concluded that "a review of the totality of the circumstances is still required and any inducement offered to the defendant is but one fact, albeit an important one, in that analysis." *United States v. Long*, 852 F.2d 975, 977 (7th Cir. 1988); see *Tippitt*, 859 F.2d at 597 ("a promise is merely one of the circumstances to determine whether the statement was freely and voluntarily given"). Using that test, the courts of appeals have routinely upheld confessions made in response to various inducements, such as a promise to bring the suspect's cooperation to the prosecutor's attention or to release the suspect on bail.⁹

⁷ E.g., *Tippitt*, 859 F.2d at 597; *United States v. Long*, 852 F.2d 975, 977 (7th Cir. 1988); *Green v. Scully*, 850 F.2d 894, 901 (2d Cir.), cert. denied, 488 U.S. 945 (1988); *United States v. Guerrero*, 847 F.2d 1363, 1366-1367 (9th Cir. 1988); *United States v. Garot*, 801 F.2d 1241, 1245 (10th Cir. 1986); *Miller*, 796 F.2d at 608; *United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir.), cert. denied, 389 U.S. 908 (1967).

⁸ *Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987); *Jarrell v. Balkcom*, 735 F.2d 1242, 1250 (11th Cir. 1984), cert. denied, 471 U.S. 1103 (1985); *United States v. Robinson*, 698 F.2d 448, 455 (D.C. Cir. 1983). See *Miller v. Fenton*, 796 F.2d at 609 n.10.

⁹ E.g., *Tippitt*, *supra*; *Long*, *supra*; *Green*, *supra*; *Guerrero*, 847 F.2d at 1366; *Cole v. Lane*, 830 F.2d 104 (7th Cir. 1987), cert. denied, 484 U.S. 1076 (1988); *United States v. Guarino*, 819 F.2d 28, 30-31 (2d Cir. 1987); *Garot*, 801 F.2d at 1243-1246; *Miller*, *supra*; *Martin*, 770 F.2d at 924-928; *United States v. Shears*, 762 F.2d 397, 400-403 (4th Cir. 1985); *United States v. Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985); *Robinson*, 698 F.2d at 455; *United States v. Fera*, 616 F.2d 590, 594 (1st Cir.), cert. denied, 446 U.S. 969 (1980); *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978); *United States v. Curtis*, 562 F.2d 1153, 1154 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); *United States v. Pomares*,

b. The decisions cited above make it clear that under modern confession law, a promise of benefits in exchange for a confession is not ordinarily considered sufficient to overbear the free will of a criminal suspect. Instead, the courts have held that a suspect may often be perfectly capable of rationally and freely weighing the advantages and disadvantages of accepting such an offer, and that there is no impediment to admitting the confession under those circumstances.

In addition to not interfering with the exercise of free will, inducements also do not ordinarily run afoul of the other policies underlying the principle of voluntariness—ensuring that confessions are reliable and avoiding reliance on evidence produced by unconscionable means. See Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 Va. L. Rev. 859, 909-924 (1979). Except in the most extreme cases, inducements offered in exchange for confessions are not regarded as outrageous government conduct. And, unlike threats of physical violence, inducements are seldom so attractive that a suspect will falsely incriminate himself in order to obtain the promised benefit.

A literal reading of *Bram* would ignore the fact that some governmental inducements, far from being "so offensive to a civilized system of justice that they must be condemned," *Miller v. Fenton*, 474 U.S. at 109, work to a suspect's advantage. A suspect who reasonably (and correctly) believes that he is likely to be convicted even without his confession can make a rational, even wise, decision to cooperate with the government in exchange for a benefit, such as leniency in charging or sentencing. For the government, confessions provide certainty, reduce the commitment of investigative and prosecutorial

499 F.2d 1220, 1222 (2d Cir.), cert. denied, 419 U.S. 1032 (1974); *United States v. Frazier*, 434 F.2d 994, 995-996 (5th Cir. 1970); *Ferrara*, 377 F.2d at 17. As Judge Easterbrook commented in his concurring opinion in *Long*, 852 F.2d at 980, "*Bram* has not excluded a confession in decades; it is a derelict, offering false hope to suspects and vexing judges who must distinguish it on the way to decisions reached on other grounds."

resources, and often lead to cooperation by the defendant in making other cases. Such a mutually beneficial "exchange of leniency for information, a common trade in the criminal justice system, is a good thing." *Long*, 852 F.2d at 980 (Easterbrook, J., concurring).

Although most courts have declined to follow the cited passage from *Bram* according to its terms, the Arizona Supreme Court's reliance on that passage in this case shows that it can still mislead courts faced with the task of assessing the voluntariness of a confession. This Court should make clear that the literal "no inducement" rule stated in *Bram* has long since lost whatever force it may have had, and that in deciding whether a statement made in response to governmental inducement is admissible, courts should not apply a per se rule of inadmissibility.

B. Sarivola's Offer To Protect Respondent's Safety In Exchange For His Explanation Of His Stepdaughter's Death Did Not Coerce Respondent's Confession

This is not a case in which the government's conduct was so inherently coercive that it necessarily rendered any confession involuntary.¹⁰ Respondent spoke to Sarivola, with whom he was on friendly terms, during a casual conversation while the two men were taking an evening stroll around the prison track. Sarivola did not summon respondent or interrogate him, their conversation was not lengthy, and respondent was at all times

¹⁰ Actions of a private party cannot violate due process and render a defendant's statements involuntary. *Connelly*, 479 U.S. at 166. The court below treated Sarivola as a government agent, and the petition does not take issue with that ruling. We thus do not address that question in this case. We do note, however, that in many cases an informant will be held on a loose tether and it would be unreasonable to attribute all of his actions to the government. In this case, the FBI agent did not tell Sarivola to threaten or question respondent, nor did the agent direct Sarivola's efforts to learn whether the rumor was true. Moreover, Sarivola was not being paid for his services when he questioned respondent about Jeneane's murder on the night at issue. J.A. 78-79, 81-82, 87-88, 108-109.

free to leave Sarivola's company. Nothing in the exchange between Sarivola and respondent remotely resembled the interrogation of a suspect in a police-dominated, custodial environment that could generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). As far as respondent was concerned, when he confessed to Sarivola he was merely confiding to a friend in private under circumstances in which he rationally concluded that it was in his interest to do so.¹¹

Sarivola did not use or threaten violence against respondent. On the contrary, Sarivola offered to use his influence as an associate of the Columbo organized crime family to protect respondent from harm by other inmates. There is no suggestion that the rumors about respondent's involvement in the murder or the hints of danger to respondent from other inmates were creations of Sarivola's, concocted in order to induce respondent to confess to the murder. There is also no evidence that respondent was explicitly threatened by other inmates. To be sure, Sarivola said that respondent was "starting to get some rough treatment and whatnot from the guys" because of the rumor. J.A. 83. Sarivola also said that an inmate who was "known" to have murdered a child or who had "admitted" doing so would be "ostracized and possibly in danger from the general population." J.A. 110; 12/11/85 Tr. 63. But respondent was in no immediate danger from other inmates when he spoke with Sarivola, and nothing in the record suggests that

¹¹ In our amicus brief in *Illinois v. Perkins*, No. 88-1972 (argued Feb. 20, 1990) (a copy of which has been provided to the parties), we argued that a meeting between an undercover officer and a prisoner in a normal prison setting bears none of the hallmarks of a coercive environment. There is no significant difference for purposes of this argument between an undercover officer who is posing as a prisoner and a prisoner, such as Sarivola, who is serving as a government informant. We also argued in *Perkins* that deception does not constitute coercion. That argument also applies to this case.

Sarivola overstated the danger posed by the other inmates in order to induce respondent to confess.¹²

Sarivola did not demand that respondent confess in return for his protection; Sarivola only asked respondent to speak the truth about the matter. If respondent had been innocent, he could have said so and presumably still would have received Sarivola's protection. For that reason, Sarivola's offer was not one likely to elicit a false confession; the case for admitting respondent's statement is therefore even stronger than when the police have made an offer that requires an admission of guilt in return.¹³ In sum, because respondent did not act under the influence of an immediate threat of serious physical injury, Sarivola did not make respondent an offer that he couldn't refuse; respondent's statement to Sarivola was the product of an exercise of free will, as this Court has used that term,¹⁴ and was properly admitted at trial.

¹² Of course, prison authorities had a duty to protect respondent, since respondent was incarcerated. See *DeShaney v. Winnebago County DSS*, 109 S. Ct. 998, 1004-1005 & n.5 (1989). There is nothing to suggest, however, that the government was derelict in that regard.

¹³ Respondent also was not a juvenile caught up for the first time in the criminal justice system, who might be particularly susceptible to Sarivola's influence. Respondent was 42 years old; he had six prior felony convictions; and he had been imprisoned on three prior occasions. Presentence Report 1, 8-9 (Feb. 5, 1986).

¹⁴ As this Court has noted, the "voluntariness rubric," which is based in part on the suspect's capacity to exercise "free will," has been subject to much criticism on the ground that it has failed to provide discernible standards for courts to apply. *Miller v. Fenton*, 474 U.S. at 116 n.4. Although it is unnecessary in this case for the Court to explore the proper scope of the "free will" component of voluntariness, we submit that Professor Grano's formulation is appropriately sensitive to the competing moral and practical interests. He advocates a principally objective test under which the "free will" or "mental freedom" component of the due process voluntariness test would ask "whether a person of ordinary firmness, innocent or guilty, having the defendant's age, physical condition, and relevant mental abnormalities (but not otherwise having the defendant's personality traits, temperament, intelligence, or social

II. THE ERRONEOUS ADMISSION OF AN INVOLUNTARY CONFESSION SHOULD NOT CALL FOR AUTOMATIC REVERSAL OF A CONVICTION, WITHOUT REGARD TO WHETHER THE ERROR MAY BE HARMLESS

In its initial decision, the Arizona Supreme Court ruled that the erroneous admission of respondent's confession to Anthony Sarivola was harmless beyond a reasonable doubt. In its second opinion, it held that that error required reversal since this Court's decisions forbid an appellate court from inquiring whether such an error was harmless. Those decisions also trace their lineage to *Bram*, which held that the erroneous admission of the defendant's confession automatically requires reversal of his conviction. 168 U.S. at 541-543. This case raises the question whether that rule should be abandoned. We submit that it should.

A. Developments In The Harmless Error Doctrine Since *Bram* Have Rendered Obsolete The Rule Of Per Se Reversal Set Forth In That Case

Bram was decided during a period of our legal history when any trial error required reversal of a defendant's conviction, and no error was too trivial to be found harmless. As one prominent jurist has noted, "[t]here was a time in the law, extending into our own century, when no error was lightly forgiven. In that somber age of technicality the slightest error in a trial could spoil the judgment. The narrow bounds of propriety were entirely surrounded by booby traps." R. Traynor, *The Riddle of Harmless Error* 3 (1970). Throughout that period, "courts of review 'tower[ed] above the trials of criminal cases as impregnable citadels of technicality.'" *Kotteakos v. United States*, 328 U.S. 750, 759 (1946). "So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing re-

background), and strongly preferring not to confess, would find the interrogation pressures overbearing." Grano, *supra*, 65 Va. L. Rev. at 906.

versible error in the record, only to have repeated the same matching of wits when a new trial had thus been obtained." *Ibid.*

Judges and scholars such as Taft, Wigmore, Pound, and Cardozo criticized that state of affairs on the ground that "justice, though due to the accused, is due to the accuser also," *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). See *Kotteakos*, 328 U.S. at 758-760 (collecting authorities). Spurred by that criticism, Congress and the States early in this century launched a "broad attack" against such "abuses," *id.* at 759, by adopting harmless error statutes "to keep the balance true," *Snyder*, 291 U.S. at 122, between society's interest in convicting the guilty and an innocent person's interest in avoiding an unjust conviction. Harmless error statutes and rules have now been adopted in every jurisdiction. *Chapman v. California*, 386 U.S. 18, 22 (1967). *E.g.*, 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). They require courts to disregard errors that do not materially affect the verdict, and they typically include the type of error held automatically fatal in *Bram*, the erroneous admission of evidence.

Even though the purpose of the harmless error doctrine was "[t]o substitute judgment for automatic application of rules," *Kotteakos*, 328 U.S. at 760, during the 70 years following *Bram* this Court frequently reiterated the rule of automatic reversal for the erroneous admission of confession evidence without inquiring whether that rule had survived contemporary developments in harmless error jurisprudence.¹⁵ Yet in 1967

¹⁵ See *Lyons v. Oklahoma*, 322 U.S. 596, 597 n.1 (1944); *Malinski v. New York*, 324 U.S. 401, 404 (1945); *Haley v. Ohio*, 332 U.S. at 599; *Gallegos v. Nebraska*, 342 U.S. 55, 63 (1951); *Stroble v. California*, 343 U.S. 181, 190 (1952); *Brown v. Allen*, 344 U.S. 443, 475 (1953); *Payne v. Arkansas*, 356 U.S. at 568; *Spano v. New York*, 360 U.S. 315, 324 (1959); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960); *Lynumn v. Illinois*, 372 U.S. at 537; *Haynes v. Washington*, 373 U.S. at 518; *Jackson v. Denno*, 378 U.S. 368, 376 (1964); *Chapman v. California*, 386 U.S. at 23 & n.8; *Lego v. Twomey*, 404 U.S. 477, 483 (1972); *Rose v. Clark*, 478 U.S. 570, 577, 578 n.6 (1986).

this Court in *Chapman v. California*, *supra*, adopted the general rule that a constitutional error does not automatically require reversal of a conviction. Since then, the Court has applied harmless error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless. *Rose v. Clark*, 478 U.S. 570, 578-579 (1986); *United States v. Hastings*, 461 U.S. 499, 509 (1983).¹⁶ In light of contemporary principles

¹⁶ Harmless error principles have been held applicable to a broad range of errors in state and federal proceedings. See, *e.g.*, *Clemons v. Mississippi*, 110 S. Ct. 1441, 1450-1451 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (admission of evidence at the sentencing stage of a capital case, in violation of the Sixth Amendment Counsel Clause); *Carella v. California*, 109 S. Ct. 2419, 2421 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497, 501-504 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction containing an erroneous rebuttable presumption); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (restriction on a defendant's right to cross-examine a witness for bias, in violation of the Sixth Amendment Confrontation Clause); *Rushen v. Spain*, 464 U.S. 114, 117-118 & n.2 (1983) (denial of defendant's right to be present at trial); *United States v. Hastings*, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Hopper v. Evans*, 456 U.S. 605 (1982) (statute improperly forbidding trial court from giving a jury instruction on a lesser included offense in a capital case, in violation of the Due Process Clause); *Kentucky v. Whorton*, 441 U.S. 786 (1979) (failure to instruct the jury on the presumption of innocence); *Moore v. Illinois*, 434 U.S. 220, 229 (1977) (admission of identification evidence in violation of the Sixth Amendment Counsel Clause); *Brown v. United States*, 411 U.S. 223, 231-232 (1973) (admission of the out-of-court statement of a nontestifying co-defendant in violation of the Sixth Amendment Confrontation Clause); *Milton v. Wainwright*, 407 U.S. 371 (1972) (admission of confession in violation of the Sixth Amendment Counsel Clause); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause).

of harmless error law, the per se rule in *Bram* can no longer be justified and should be expressly repudiated.

B. The Admission Of A Defendant's Involuntary Confession Is Not The Type Of Error That Automatically Requires A Conviction To Be Reversed

1. A basic principle of modern American law—applicable equally to criminal and civil cases, and to constitutional and nonconstitutional claims—is that a trial court's judgment should not be reversed if the party defending that judgment can show that any error that occurred at trial had no effect on the outcome. That principle, which is the essence of the harmless error rule, recognizes that the trial of a criminal case can be an extremely complex undertaking, and that correcting every error that occurs before or during a criminal trial by ordering a new trial is both costly and pointless. New trials consume scarce resources and introduce additional delays into the administration of justice. Delay is the enemy of truth and can make a retrial difficult, if not impossible, because the memories of witnesses can fade, witnesses may decline to testify, they may move or die, and critical evidence can be lost. Even if a new trial rectifies errors made at the first trial, there is still the risk that new and different errors will take their place. Nor is the accuracy of verdicts the only victim of delay. All of the participants in the criminal justice system—judges, prosecutors, victims of crime, the community, as well as the persons accused of crime—have a powerful interest in resolving criminal charges at one trial, if possible.¹⁷ The harmless error doctrine therefore serves

¹⁷ Retrials increase the trial court's case load, which inevitably delays the disposition of other cases, decreases the care with which the court can handle the matters before it, and consumes valuable time that could be spent on legal study, thus increasing the risk of mistake in every case that the judge tries. Retrials increase the burden on the prosecution, which may force the prosecutor to agree to plea bargains that would otherwise be unacceptable, or to abandon some cases altogether. Delays can burden other defendants, whose trials must be postponed in order to accommodate retrials in other cases. Witnesses needlessly relive painful experiences, which deters

a variety of important interests in the administration of justice and reinforces "the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Of course, if an error creates a substantial risk that an innocent person has been convicted, the judgment cannot be allowed to stand. Moreover, this Court has acknowledged that some constitutional errors are so inconsistent with fundamental fairness or inherently so prejudicial that reversal of a conviction is necessary whenever they occur. Such errors include a trial before a judge with a financial interest in the outcome and the complete denial of counsel at trial. *Clark*, 478 U.S. at 577-579. In Justice Harlan's words, those errors "have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless." *Chapman*, 386 U.S. 52 n.7 (dissenting opinion). The other errors that the Court has placed in that category also involve instances in which it is impossible to make a reliable determination of prejudice, or in which an error strikes at fundamental societal values that transcend the criminal process and outweigh society's otherwise compelling interest in convicting persons who commit crimes.¹⁸

voluntary cooperation with the criminal justice system and makes victims of crime also victims of the system. The community's interest in retribution and in the swift administration of justice is harmed by delay, as is society's interest in the incapacitation, rehabilitation, and deterrence of offenders. And when a person accused of a serious crime is free on bail, a delay in bringing his prosecution to a close prolongs public anxiety over community safety and increases the risk that he will commit new crimes while at large.

¹⁸ See *Young v. Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion) (appointment of a prosecutor with a financial interest in the outcome creates an appearance of impropriety and has effects on the prosecution that are difficult to assess); *Rose v. Clark*, 478 U.S. at 578 ("harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury"); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of members of the defendant's race from the

2. *Bram* held that the erroneous admission of a defendant's statement always requires reversal since, as a matter of logic, a specific item of evidence cannot be both probative and nonprejudicial. 168 U.S. at 541-543. There is a "contradiction," *Bram* concluded, between "the assertion that the statement of an accused tended to prove guilt, and therefore was admissible," and the argument on appeal that the same statement "did not tend to prove guilt, and could not, therefore, have been prejudicial," *id.* at 542.

While the assertion that probative evidence could be harmless may have seemed contradictory at the turn of the century, there is no such contradiction under modern principles of appellate review. In the modern system, the analysis that a trial court performs to decide whether

grand jury strikes at fundamental values of our society and does not lend itself to harmless error analysis); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (erroneous denial of a defendant's right to represent himself at trial cannot be harmless, since exercise of the right increases the likelihood of conviction); *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979) (suggesting that failure to instruct a jury on the reasonable doubt standard cannot be harmless); *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) (improper compulsory joint representation of defendants with conflicting interests does not lend itself to harmless error analysis because what conflict-free counsel could have done will not be clear from the record). Cf. *Waller v. Georgia*, 467 U.S. 39, 49 & n.9 (1984) (defendant need not show specific prejudice in order to obtain reversal because of denial of a public trial, due to difficulty of making that showing).

In some instances, prejudice is an element of a constitutional violation. See, e.g., *United States v. Bagley*, 473 U.S. 667, 682 (1985) (prosecution's failure to disclose potentially exculpatory evidence); *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (ineffective assistance of counsel); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982) (deportation of potential defense witness); *Weatherford v. Bursey*, 429 U.S. 545, 554-557 (1977) (defendant's right to counsel not infringed where attorney-client information obtained by government informant had no effect on the trial). Such claims are not subject to harmless error analysis, since it is redundant to ask whether an error affected the outcome if the defendant has already shown that the error was prejudicial in proving its existence.

to admit evidence is not the same as the analysis that an appellate court uses to decide whether the erroneous admission of that evidence is harmless. A trial judge generally must admit all "relevant" evidence, *i.e.*, evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401. That threshold is a very low one, and does not require that an item of evidence be sufficient to sustain a judgment in a proponent's favor in order for it to be admitted.¹⁹ The harmless error inquiry is quite different. Under that analysis, an appellate court must uphold a judgment after reviewing the entire record if erroneously admitted evidence did not have a "substantial influence" on the outcome of the trial. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988); *Kotteakos*, 328 U.S. at 765. Thus, a specific item of evidence can be probative, because it has some tendency to prove a matter at issue, but insignificant in the context of the entire record, if other evidence overwhelmingly proves the same matter, or if the evidence relates only to a matter that was not disputed. The "contradiction" that troubled the Court in *Bram* is present only when an erroneously admitted item of evidence is the *sole* proof of a disputed issue. In all other cases, there is no necessary contradiction between the conclusion that evidence is probative and the conclusion that its erroneous admission is nonprejudicial.

3. Although contemporary harmless error doctrine has eliminated the logical justification for the rule adopted in

¹⁹E. Cleary, *McCormick on Evidence* § 185, at 542-543 (3d ed. 1984) ("An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. * * * Whether the entire body of evidence is sufficient to go to the jury is one question. Whether a particular item of evidence is relevant to his case is quite another. * * * A brick is not a wall.") (footnotes omitted); 1A J. Wigmore, *Evidence* § 29, at 976 (P. Tillers rev. ed. 1983); Notes of Advisory Committee on Proposed Rules, 28 U.S.C. at 744 (1988) ("[I]t is not to be supposed that every witness can make a home run").

Bram, one could seek to defend the rule on practical grounds. It could be argued that admission of a defendant's coerced confession should always be held prejudicial since "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him," *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting), and because when a coerced confession is part of the evidence before the jury, "no one can say what credit and weight the jury gave to the confession," *Payne v. Arkansas*, 356 U.S. 560, 568 (1985). Since a defendant's confession is extremely powerful evidence that is likely to be prejudicial in most cases, the argument runs, it is reasonable and efficient to adopt a rule of automatic reversal.

That argument, however, is flawed. It is true that the erroneous admission of a defendant's confession will very often be prejudicial. But it does not follow that the admission of the defendant's confession can *never* be harmless. The uniquely powerful impact of most confession evidence simply means that the government will often be unable to carry its burden of establishing that the error of admitting an involuntary confession was harmless. But that is no reason to adopt a rule of law barring the government from *ever* making that showing. In many cases, such as this one, the defendant may have made a second (or third, or fourth) admissible confession that is similar to the one held inadmissible.²⁰ Other proof, such as videotape evidence, eyewitness testimony, the testimony of confederates, the fruits of a crime (such as narcotics found on the defendant's person), recorded wiretap conversations, fingerprints, or genetic identification, may supply overwhelming proof of the accused's guilt.

²⁰ It is not uncommon for defendants to make multiple inculpatory statements. *E.g.*, *United States v. Bayer*, 331 U.S. 532 (1947); *Stroble*, *supra*; *Westover v. United States*, decided together with *Miranda*, *supra*; *Oregon v. Elstad*, 470 U.S. 298, 322-324 nn.3-6 (1985) (Brennan, J., dissenting) (citing 50 lower court cases).

In addition, not all statements by defendants constitute full admissions of guilt. In many instances, a defendant's statement may be only moderately inculpatory, and the prejudicial effect of that statement may be overwhelmed by other aspects of the government's case. In each instance, the government may be able to carry its burden under *Chapman*, and in some cases it may be able to do so without great difficulty. There is no principled reason to deny the government that opportunity.

The Court has applied harmless error analysis in several closely related contexts where it also could have been argued that erroneously admitted evidence would ordinarily seal a defendant's fate. For instance, *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988), and *Milton v. Wainwright*, 407 U.S. 371 (1972), held that the admission of a defendant's statements obtained in violation of the Sixth Amendment is subject to harmless error analysis. The Court so ruled even though the impact of the inadmissible evidence would appear to be the same as the impact of a confession secured in violation of the Fifth Amendment. Similarly, *Moore v. Illinois*, 434 U.S. 220, 232 (1977), *Gilbert v. California*, 388 U.S. 263, 274 (1967), and *United States v. Wade*, 388 U.S. 218, 242 (1967), held that the admission of evidence obtained at a post-indictment lineup in violation of the Sixth Amendment is subject to harmless error analysis, even though the Court recognized that an identification at a lineup "might well settle the accused's fate and reduce the trial to a mere formality," *Wade*, 388 U.S. at 224. And *Brown v. United States*, 411 U.S. 223, 231-232 (1973), *Schneble v. Florida*, 405 U.S. 427 (1972), and *Harrington v. California*, 395 U.S. 250 (1969), held that the admission of an out-of-court statement of a nontestifying co-defendant is subject to harmless error analysis. The Court so ruled even though it had previously held that admission of such evidence could be "devastating" to the accused, *Bruton v. United States*, 391 U.S. 123, 136 (1968), that it creates a "serious flaw[] in the fact-finding process at trial," *Roberts v. Russell*, 392 U.S. 293, 294 (1968), and that it

poses "a serious risk that the issue of guilt or innocence may not have been reliably determined," *id.* at 295.

Implicit support for that point can be found in the uniform ruling of lower courts that the admission of a defendant's statements obtained in violation of *Miranda* is subject to harmless error analysis.²¹ Although statements taken in violation of *Miranda* and statements taken in violation of the principles of voluntariness are inadmissible for different reasons, they are likely to have a similar impact on the jury if they are admitted; if anything, statements taken in violation of *Miranda* are likely to have an even greater impact, as the jury will have less reason in that setting to believe that the statements are the unreliable products of coercion or other improper investigative conduct. Nonetheless, a per se rule of reversal has not been applied in the *Miranda* setting, and such a rule is equally inappropriate here.

This Court has made clear that automatic reversal is unwarranted when an error does not "affect the composition of the record." *Rose v. Clark*, 478 U.S. at 579 n.7. If appellate review "does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence * * * there is no inherent difficulty in evaluating whether the error prejudiced [a defendant] in th[e] case." *Ibid.* As the Court explained in *Satterwhite v. Texas*, 486 U.S. at 256-257, and *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978), "[i]n the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the delib-

²¹ *E.g.*, *Howard v. Pung*, 862 F.2d 1348, 1351 (8th Cir. 1988), cert. denied, 109 S. Ct. 3247 (1989); *United States v. Johnson*, 816 F.2d 918, 923 (3d Cir. 1987); *Bryant v. Vose*, 785 F.2d 364, 367 (1st Cir.), cert. denied, 477 U.S. 907 (1986); *Martin v. Wainwright*, 770 F.2d 918, 932 (1985), modified, 781 F.2d 185 (11th Cir.), cert. denied, 479 U.S. 909 (1986); *United States v. Ramirez*, 710 F.2d 535, 542-543 (9th Cir. 1983); *Harryman v. Estelle*, 616 F.2d 870, 875 (5th Cir.) (en banc), cert. denied, 449 U.S. 860 (1980).

erations of the jury." Harmless error analysis is permissible, the *Satterwhite* Court noted, "in both capital and noncapital cases where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial." 486 U.S. at 257.

The error in this case is indistinguishable from the ones in *Satterwhite*, *Milton*, *Moore*, and *Brown*, because this case also involves the erroneous admission of evidence. Reviewing courts can examine the record to gauge whether that error was harmless. That the error violated the Fifth Amendment, not the Sixth, does not make that inquiry any more difficult.

In sum, when the error at issue is the improper admission of evidence, it is not necessary to speculate about what the record would have reflected if the error had not been committed. For that reason, it is not surprising that, other than coerced confessions, there is no class of evidence the erroneous admission of which has been held to be per se prejudicial.

4. It could be argued that a rule of automatic reversal is necessary to protect values other than the accuracy of verdicts. Cf. *Vasquez v. Hillery*, 474 U.S. 254 (1986) (discrimination in the selection of grand jurors). Coerced confessions are inadmissible not only because they are considered unreliable, but also because due process forbids the police from using interrogation techniques "offensive to a civilized system of justice," *Miller v. Fenton*, 474 U.S. at 109, whether or not a confession is reliable. *Rogers v. Richmond*, 365 U.S. 534 (1961); *Jackson v. Denno*, 378 U.S. 368, 385-386 (1964). It could therefore be argued that coerced confessions should be exempt from harmless error analysis, since they are excluded in part for reasons independent of the accuracy of the verdict.²²

²² Justice Harlan made a closely related argument in his dissent in *Chapman v. California*, *supra*. He suggested that certain types of intentional official misconduct should always result in reversal to demonstrate society's intolerance for such misbehavior. 386 U.S. at 52 n.7. That theory is similar to the one stated in the text. To the extent it differs, that theory rests on a deterrence rationale, and

That argument, however, has already been rejected in other closely analogous contexts. Government misconduct that results in violations of the Fourth and Sixth Amendments may be at least as reprehensible as misconduct that results in a coerced confession. Yet this Court has consistently held harmless error principles applicable to evidence that is the product of such violations. See *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970); *Satterwhite v. Texas*, 486 U.S. at 256; *Milton v. Wainwright*, 407 U.S. at 372-373, 378-379. There is no reason to accord special status to a confession obtained by way of coercion, in contrast to physical evidence obtained as a result of an unlawful search, or statements obtained through a violation of the Sixth Amendment.

That conclusion is consistent with the role that due process plays in a criminal trial. As Justice Stevens wrote for a unanimous Court in *Mabry v. Johnson*, 467 U.S. 504, 511 (1984), "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." The Court made the same point in *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (citation omitted), explaining that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. * * * [T]he aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'" If the admission of a defendant's confession is harmless beyond a reasonable doubt, the accused has not been denied a fair trial.

is inconsistent with *United States v. Hasting*, 461 U.S. 499 (1983). There, the court of appeals reversed a conviction due to the prosecutor's comment on the defendant's silence at trial and declined to consider whether the error was harmless, since doing so "would impermissibly compromise the clear constitutional violation." 660 F.2d 301, 303 (7th Cir. 1980). This Court reversed, holding that "the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court [of appeals] viewed as prosecutorial overreaching." 461 U.S. at 507.

III. STARE DECISIS CONSIDERATIONS DO NOT PRECLUDE RECONSIDERATION OF THE RULES ADOPTED IN *BRAM*

The doctrine of *stare decisis* serves important purposes in our legal system. It promotes the evenhanded, predictable, and consistent development of legal principles; it fosters reliance on judicial rules; and it contributes to the fact and the appearance of integrity in the judicial process. *Vasquez v. Hillery*, 474 U.S. at 265-266. But "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), especially when constitutional issues are involved, since "correction through legislative action is practically impossible." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting). *Stare decisis* "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Id.* at 407-408. And *stare decisis* has less weight when new facts or later cases have eroded the precedential value or rationale of a prior decision.²³

This is just such a case. The rules adopted in *Bram* have not survived this Court's recent decisions on the issues of coerced confessions and harmless error. On both issues, *Bram* is "outdated, illogical, * * * [and] legitimately vulnerable to serious reconsideration." *Vasquez*, 474 U.S. at 266. What the Court wrote in *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), about *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), is equally true of *Bram*: It "is the product of another time[,] * * *

²³ E.g., *Alabama v. Smith*, 109 S. Ct. 2201, 2206 (1989); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 241-248 (1987); *Puerto Rico v. Branstad*, 483 U.S. 219, 224-230 (1987); *United States v. Miller*, 471 U.S. 130, 144 (1985); *United States v. Leon*, 468 U.S. 897, 908-913 (1984); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 357-361 (1984); *United States v. Salvucci*, 448 U.S. 83, 88 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 331-332 (1979).

[y]et this decision has stood while the world of which it was a part has passed away." 483 U.S. at 230.

CONCLUSION

The judgment of the Supreme Court of Arizona should be reversed.

Respectfully submitted.

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No. 89-839 ⁽⁶⁾

In The
Supreme Court of the United States
October Term, 1989

STATE OF ARIZONA,
Petitioner,

--against--

ORESTE C. FULMINANTE,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF ARIZONA

MOTION TO FILE BRIEF
AND
BRIEF AMICI CURIAE OF
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE NATIONAL DISTRICT
ATTORNEYS ASSOCIATION, INC.,
THE NATIONAL SHERIFFS' ASSOCIATION, INC.,
AND THE LINCOLN LEGAL FOUNDATION,
IN SUPPORT OF THE PETITIONER.

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No. 89-839

In The
Supreme Court of the United States
October Term, 1989

STATE OF ARIZONA,
Petitioner,
--against--

ORESTE C. FULMINANTE,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF ARIZONA

MOTION TO FILE BRIEF
AND
BRIEF AMICI CURIAE OF
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE NATIONAL DISTRICT
ATTORNEYS ASSOCIATION, INC.,
THE NATIONAL SHERIFFS' ASSOCIATION, INC.,
AND THE LINCOLN LEGAL FOUNDATION,
IN SUPPORT OF THE PETITIONER.

This motion and brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner. As of the time of the printing of this motion and brief, consent ~~has not been received~~ ^{has refused} from the Respondent. The letter of Consent of Petitioner has been filed with the Clerk of this Court, as required by the Rules.

Come now *Americans for Effective Law Enforcement, Inc., et al.*, and move this Court for leave to file the attached brief as *amici curiae*, and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States, and thirty-eight times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time

protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association Inc. (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The Lincoln Legal Foundation (LLF) is a national, nonprofit, nonpartisan, public-interest law center which undertakes litigation, administrative proceedings, legal studies, and educational activities in matters promoting political, economic, and civil liberties; preserving constitutional government, including the separation and limitation of governmental powers; and defending the rights of innocent victims of crime.

2. *Desirability of an Amici Curiae Brief.* *Amici* are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of adopting and implementing guidelines for the conduct of interrogations; (2)

prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby; and (3) members of the business and professional communities devoted to the goal of effective law enforcement.

Because of the relationship with our members, and the composition of our membership and directors -- including active law enforcement administrators and counsel at the state and national level -- we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, NDAA, NSA, and LLF are state and national associations, and their perspective is broad. This brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding police conduct in the law of interrogation. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the facts of this case and has conferred at length with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received and filed with the Clerk of

this Court. This Motion is necessary because the Respondent has not as of the time of printing of the Brief granted consent to *amici* in writing. Should it be received thereafter, it will be filed by counsel with the Clerk of this Court with a request that this motion be withdrawn and the brief be deemed filed with the consent of all parties.

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF AMICI

See Section on Identity and Interest of *Amici Curiae*, *supra*.

STATEMENT OF FACTS

The facts, as stated in the Arizona court's opinion, *State v. Fulminante*, 161 Ariz. 237, 778 P.2d 602 (1988), revealed that the respondent-inmate (hereinafter referred to as "defendant") had been a suspect in the killing of his step-daughter, but no charges had been filed against him.

While the defendant was in a New York prison on a weapon's possession conviction, he became friends with another inmate, Anthony Sarivola, who was serving a 60 day sentence for extortion. Sarivola, with an organized crime background, had become an F.B.I. informer; and while in prison, he was posing as an organized crime figure.

After Sarivola and the defendant became friends, Sarivola heard a rumor that the defendant had been suspected of killing a child. This the defendant denied, but the rumor was passed on to Sarivola's F.B.I. contact, who instructed Sarivola to find out more about it.

According to Sarivola, defendant had been receiving "rough" treatment from other inmates because of the rumor, so Sarivola suggested to the defendant that if defendant told Sarivola the truth he would "give him help." Defendant then admitted the child killing and supplied details about it.

Sarivola was released from prison in November, 1983; defendant was released in May, 1984. Sarivola and his fiancée, Donna, picked up defendant at a local bus stop

and he was asked if he had any relatives he wished to see, whereupon defendant said he couldn't return home because he had killed a little girl in Arizona. They then drove defendant to a friend's house in Pennsylvania. Later he was arrested in New York on another weapon's possession charge.

Upon indictment for the child murder, defendant sought to suppress the statements he had made to Sarivola, and to him and Donna. Suppression was denied, defendant was found guilty, and he was sentenced to death. He appealed.

Initially the Arizona Supreme Court affirmed the conviction and sentence, 161 Ariz. 237, 778 P.2d 602 (1988). Then, in a "supplemental opinion," 778 P.2d at 626, three of the five Justices vacated the conviction and remanded the case for retrial without the use of "the original coerced confession" made while in prison. (One of the Justices did not participate in the supplemental ruling; another had retired before the supplemental opinion was rendered. The remaining Justice dissented).

In its first opinion, the Arizona Supreme Court had held that while the defendant's confession to Sarivola was inadmissible as evidence because of its coercive nature, the second one was not the fruit of the poisonous tree and consequently had been properly admitted. The erroneous admission of the first confession, though a "coerced" one, was considered harmless error. However, in the supplemental opinion, the court reversed its position, deciding that the harmless error doctrine could not be applied to a coerced confession.

The dissenting Justice Cameron, 778 P.2d at 628, contended that the harmless error doctrine was applicable to involuntary confessions, and not just to *Miranda*-flawed ones. He was of the view that the federal

cases upon which the majority now relied were "not sound authority for its ruling." 778 P.2d at 628. He stated that only three of the cited cases were of any relevance. They were ones that involved confessions obtained by the police under circumstances "that resulted in the defendant being in a weakened, vulnerable physical condition and the police using coercive pressure through intensive interrogation to elicit a confession." 778 P.2d at 629. According to Justice Cameron, the police tactics in those cases violated due process of law and, therefore, mandated rejection or usage "in any way" against a defendant.

ARGUMENT

I. DEFENDANT'S CONFESSION WAS NOT COERCED; THE PROMISE MADE TO HIM BY A FELLOW PENITENTIARY INMATE (A GOVERNMENT INFORMER) DID NOT PRESENT "A SUBSTANTIAL RISK OF A FALSE CONFESSION." IT CONSISTED OF A STATEMENT THAT THE INMATE WOULD PROTECT DEFENDANT FROM OTHER PRISONERS WHO SUPPOSEDLY HAD BEEN GIVING HIM "ROUGH" TREATMENT BECAUSE OF A RUMOR THAT DEFENDANT HAD KILLED A CHILD.

II. EVEN IF THE CONFESSION HAD BEEN COERCED BY THE INFORMER'S PROMISE, ITS ADMISSION INTO EVIDENCE AT THE CHILD MURDER TRIAL WOULD HAVE CONSTITUTED HARMLESS ERROR, BECAUSE THE TOTALITY OF CIRCUMSTANCES ESTABLISHED OVERWHELMING EVIDENCE OF GUILT.

Amici will not discuss at length the case law analysis of the Petitioner State of Arizona in this case, although we agree with that analysis. Instead, we will concentrate upon policy issues raised by this case and our need as law enforcement administrators and concerned members of Society to ensure that law enforcement officers have sufficient guidance in the area of permissible interrogation techniques.

We note, initially, that promises *per se* do not categorically nullify a confession. A clear example, and a generally accepted one, is a promise of secrecy, as, for instance, one made to a suspect who requests that his mother not be told of his criminal act. (Actually, a promise of such secrecy affords added assurance of truthfulness.) Other promises that are treated in a

similar fashion are promises to recommend light bail, or a promise to seek psychiatric treatment after the suspect's incarceration. Core references and a general discussion of the legal effects of promises may be found in Inbau, Reid, and Buckley, *Criminal Interrogation and Confession*, (3d ed. 1986) at pp. 214, 315-318. Also, as regards such promises as psychiatric help, see *Miller v. Fenton*, 796 F.2d 598 (3rd Cir. 1986), in which the court held that this kind of promise did not produce "psychological pressure strong enough to overbear the [defendant's] will." (p. 613)

Amici suggest to this Court that the best and fairest test regarding promises is in a New York statute: Does the promise present a "substantial risk" of a false confession. Article 60.45, *Criminal Procedure Law*, Book 11-A, McKinney's Consolidated Laws of New York. Such a test also has the merit of giving the police reasonably clear guidance in this area of interrogation.

In the instant case the defendant never expressed to the prison guards or its officials that he had any fear of harm from other inmates. He knew only what the informer told him about a "rumor" within the prison. This information, and a promise to give him help, presented no "substantial risk" of the defendant making a false confession.

The confession the defendant made after his release from prison was considered by the lower courts to be voluntary and free from any taint of the original one. It, therefore, presents no problem to this Court.

With regard to the "harmless error" issue, the discussion in the dissenting opinion of Justice Cameron clearly supports the position that the doctrine applies to involuntary confessions as well as to *Miranda*-flawed ones. He points out that the decisions of this Court

holding the "harmless error" rule inapplicable to involuntary confessions all involved egregious police conduct that amounted to a violation of due process. And in *Milton v. Wainwright*, 407 U.S. 371 (1972), this Court actually applied a harmless error analysis in a claim by a habeas corpus petitioner that his confession was involuntary as well as being in violation of the Sixth Amendment right to counsel. Other courts have followed the lead of *Milton* in applying a harmless error analysis to claims of involuntary confessions. *E.g.*, *United States v. Carter*, 804 F.2d 487 (8th Cir. 1986); *Harrison v. Owen*, 682 F.2d 138 (7th Cir. 1982); *State v. Childs*, 430 N.W.2d 353 (Wis. App. 1988); *State v. Dean*, 363 S.E.2d 467 (W.Va. 1987); *Hinshaw v. State*, 393 So. 2d 762 (Ala. 1981). *See also*, *Meade v. Cox*, 438 F.2d 323 (4th Cir. 1971); *United States ex rel. Moore v. Follette*, 425 F.2d 925 (2d Cir. 1970), *cert. denied*, 398 U.S. 966; *People v. Ferkins*, 116 A.D.2d 760, 497 N.Y.S.2d 159 (1986); *State v. Casteneda*, 150 Ariz. 382, 724 P.2d 1 (1986); *Kelley v. State*, 470 N.E.2d 1322 (Ind. 1984); *State v. Johnson*, 35 Wash. App. 380, 666 P.2d 950 (1983); *People v. Gibson*, 109 Ill. App. 3d 316, 440 N.E.2d 339 (1982).

One of the recent federal cases, in which this Court denied certiorari, is *United States v. Murphy and Stauffer*, 763 F.2d 202 (6th Cir. 1985), *cert. denied*, 474 U.S. 1063. In *Murphy* the defendant made incriminating statements while he was being apprehended by an attacking police dog but without police misconduct or interrogation. The Circuit Court ruled the statements were inadmissible as evidence, but the admission of them was harmless error in view of the overwhelming evidence of guilt.

The decisions in *Milton* and subsequent cases are adequately supportive of the applicability of the harmless error doctrine in involuntary confession case situations. This rule is necessary to assure that all segments of the criminal justice system--from police to courts--have

adequate and reasonable guidance on the topic. The police, in particular, while not desirous of ever violating the constitutional rights of interrogated suspects, must have some guidance to the effect that good faith violations of highly technical rules will be subjected to reasonable rules of admissibility and trial error. The "harmless error" rule as applied broadly to confessions is such a reasonable rule.

CONCLUSION

In the absence of egregious police conduct that would come within the orbit of violations of due process, *amici* urge this Court to reverse the ruling of the court below and hold that the admission of defendant's original confession was (a) properly admitted in evidence, or (b) even if it were considered inadmissible, its admission was harmless error. We most certainly share Justice Cameron's view that the costs of applying the exclusionary rule in this case should not be ignored. "[C]onsidering the costs and benefits," he stated, the costs are too great and the benefits negligible.

Respectfully submitted,

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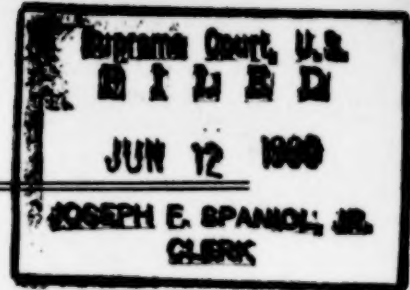
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No. 89-839



In The
Supreme Court of the United States
October Term, 1989

STATE OF ARIZONA,

Petitioner,

v.

ORESTE C. FULMINANTE,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Arizona

BRIEF AMICUS CURIAE OF THE NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*¹

The National Association of Criminal Defense Lawyers, Inc., (NACDL), is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers and 28,000 affiliate members. NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated association and awards it full representation in the ABA House of Delegates.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. The cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional protection of an individual's Fifth Amendment privilege against self-incrimination. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee, as would adoption of the position taken by the petitioner in the instant case.

The *Amicus Curiae* Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that NACDL should offer its assistance to the Court.

STATEMENT OF THE CASE & FACTS

Amicus adopts the statement of the proceedings below and facts as set forth in respondent's brief.

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 36.2.

SUMMARY OF THE ARGUMENT

In reversing respondent's conviction, the Arizona Supreme Court, relied upon two long-standing and well established propositions of constitutional jurisprudence: first, that the Fifth and Fourteenth Amendments prohibit the use of involuntary confessions in the trial of criminal defendants; and second, that the introduction into evidence of an involuntary coerced confession in the trial of a criminal defendant is *per se* reversible error, not subject to harmless error analysis. As to the first proposition, the Arizona Supreme Court correctly determined the confession in issue was the result of governmental coercion and its admission into evidence violated the Fifth and Fourteenth Amendments. As to the second proposition, compelling policy reasons and the principle of *stare decisis* support the continuation of the *per se* exclusionary rule for involuntary coerced confessions and, alternatively, assuming *arguendo* harmless error analysis applies to involuntary confession cases, introduction of respondent's coerced confession did not constitute harmless error.

1. The Arizona Supreme Court correctly applied the "totality of circumstances" test mandated by *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and thus properly determined that Fulminante's confession was the result of governmental coercion and its admission into evidence violated the Fifth and Fourteenth Amendments.

Petitioner's contention that the Arizona Supreme Court applied a "but for" test is belied by the original and supplemental opinions of that Court. An analysis of those opinions clearly demonstrates that the lower court correctly identified the "totality of circumstances" test, correctly identified the applicable burden of proof, carried out an extensive fact finding process, weighed competing evidence, factual inferences and arguments and finally, reasonably concluded that the state had failed to demonstrate by a preponderance of the evidence that Fulminante's Raybrook confession was freely and voluntarily given.

The decision of the Supreme Court of Arizona does not present this Court with a difficult situation of having to overrule the precedent of *Bram v. United States*, 168 U.S. 532 (1897). This is so because the predicate of the decision of the lower court was not "inducement"; rather the Arizona Supreme Court based its decision upon a finding of "extreme coercion" patently supported by historical facts.

Finally, review of the historical facts found by the Arizona Supreme Court and the reasonable inferences that can be drawn therefrom, in addition to a comparison of precedent of this Court in other cases involving psychologically coerced confessions, lead to the unmistakable conclusion that the decision of the Arizona Supreme Court, finding Fulminante's confession to have been the product of governmental coercion, was correct.

2. Despite significant interests generically supporting the harmless error doctrine, from its inception, this Court has recognized a group of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967). Characteristically, this group consists of errors that, by their very nature, abort the trial process, rendering any conviction fundamentally unfair. Use of an involuntary, coerced confession has consistently and without exception been identified by this Court as being within this core group of constitutional rights mandating automatic reversal. *E.g.*, *Rose v. Clark*, 478 U.S. 570, 577 n. 6 (1986). This line of post-*Chapman* authority follows directly from an unbroken series of pre-*Chapman* cases expressly holding that prosecutorial use of involuntary statements can never constitute harmless error. *E.g.*, *Malinski v. New York*, 324 U.S. 401 (1945); *Haynes v. Washington*, 373 U.S. 503 (1961).

Given decades of precedent denying application of harmless error analysis to coerced confession cases, application of the doctrine of *stare decisis* mandates continued adherence to this established rule of law. Compelling reasons to break from the Court's prior holdings do not exist: no intervening development in the law has weakened the conceptual underpinnings

of the well-established *per se* reversal rule in coerced confession cases, later law has not rendered the Court's prior cases irreconcilable with any competing legal doctrine or policy, and no evidence suggests the rule has proved unworkable, confusing or is exacting intolerable social costs.

In addition, given the "adhorrence of society to the use of involuntary confessions," *Spano v. New York*, 360 U.S. 315, 320 (1959), the policies underlying suppression of involuntary confessions strongly militate against application of the harmless error doctrine in such cases. The overwhelming evidentiary effect of a defendant's confession on a jury, in combination with the forbidden methods used by the State to extract a coerced confession, establish involuntary confessions as a paradigm of intrinsically harmful constitutional error *per se*.

Finally, assuming *arguendo* that harmless error analysis applies, where defendant's involuntary confession provides the primary evidence against him and was the focal point of the trial, its erroneous admission did not constitute harmless error.

ARGUMENT

I. THE ARIZONA SUPREME COURT CORRECTLY DETERMINED FULMINANTE'S CONFESSION TO AN INMATE INFORMANT WAS INVOLUNTARY AS THE RESULT OF GOVERNMENTAL COERCION AND ITS ADMISSION IN EVIDENCE VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS.

A. When a defendant objects to the admission of his confession, the trial court is required to determine its voluntariness based upon a totality of circumstances test.

Since the seminal case of *Brown v. Mississippi*, 297 U.S. 278 (1936), this Court has consistently held that the Fifth and Fourteenth Amendments prohibit the use of involuntary coerced confessions in the trial of criminal defendants. Thus, when a criminal defendant objects to the admission of a confession he contends to be the result of governmental

coercion, the burden is upon the government to prove, by a preponderance of the evidence, that the confession was freely and voluntarily given. *Lego v. Twomey*, 404 U.S. 477 (1972).

In determining the voluntariness of a confession, subsequent case law has established several basic guidelines for judicial analysis. First, in determining whether the statement was voluntarily given, the reliability or truth or falsity of the statement is not a relevant factor. See *Jackson v. Denno*, 378 U.S. 368 (1964) and *Rogers v. Richmond*, 365 U.S. 534 (1961).

Second, the question of voluntariness depends upon whether the government can demonstrate "the confession [is] the product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). As otherwise stated, "if [the defendant's] will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

Third, in order to bar a confession as being involuntarily obtained, "coercive policy activity" must be present. *Colorado v. Connelly*, 479 U.S. 157 (1986). Finally, the crucial facts and reasonable inferences drawn therefrom must be analyzed from the viewpoint of the "totality of circumstances" found to exist. *Schneckloth*, 412 U.S. at 226.

It is uncontradicted that confessions resulting from brutal and violent behavior on the part of government officials are constitutionally invalid. *Brown v. Mississippi*, *supra*. In addition, "this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S. 199 (1960).

The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases . . . where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused.

Haynes v. Washington, 373 U.S. 503, 515 (1963).

Thus, existing precedent has found confessions involuntarily extracted from defendants in a wide variety of situations. But, "[t]he significant fact about all of these decisions is that none of them turn on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances." *Schneckloth, supra*.

B. The Arizona Supreme Court correctly applied the totality of circumstances test and, upon the historical facts found, correctly determined Fulminante's confession to have resulted from coercion.

Petitioner and its *amicus* contend the Arizona Supreme Court applied an incorrect test to determine the voluntariness of Fulminante's confession. Both urge that the lower court applied a "but for" analysis, rather than making its determination from a "totality of the circumstances".

This position is incorrect for it ignores the clear language of the Arizona Supreme Court's opinions recognizing the "totality of circumstances" test as being the correct test to be applied and further ignores the extensive factual recitation and balancing of competing evidence contained in the state court's opinions.

Whenever a lower court, whether it be trial or appellate, undertakes to determine the question of voluntariness of a confession, it is "forced to resolve a conflict between two fundamental interests in society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement." *Spano v. New York*, 360 U.S. 315, 316 (1959). Such a determination presents "the anxious task of reconciling the responsibility of the police for ferreting out crime with the right of the criminal defendant, however guilty, to be tried according to constitutional requirements." *Culombe v. Connecticut*, 367 U.S. at 569.

As has been earlier noted, this analysis is carried out on the basis of the totality of circumstances presented with the government having the burden of proof to establish by a

preponderance of the evidence that the confession was freely and voluntarily given. An analysis of the original and supplemental opinions of the Arizona Supreme Court reveals that court to have correctly identified the "totality of circumstances" test, to have correctly identified the applicable burden of proof, to have carried out an extensive fact finding process, to have weighed competing evidence, factual inferences, and arguments, and to have reasonably concluded that the State had failed to demonstrate by a preponderance of the evidence that Fulminante's Raybrook confession was freely and voluntarily given.

(1) The Original Opinion.

In its original opinion, the Arizona Supreme Court correctly recognized that when considering the question of voluntariness "[t]he state must show by a preponderance of the evidence that a confession is freely and voluntarily made." Appendix A to Cert. Pet. at 20. The Court further recognized that the determination of voluntariness of confession "must be viewed in a totality of the circumstances." *Id.* at 22.

Subsequently, the Court turned to the facts of the case and correctly noted that little or no evidence was presented at the time of the suppression hearing to support Fulminante's claim that the confession was involuntarily obtained.² *Id.* at 20. However, as Arizona law mandates, the Court then proceeded to consider all of the evidence and the totality of circumstances presented thereby. *Id.* at 21.

In reviewing the evidence, the Court found that Fulminante had been receiving rough treatment from other inmates and that Sarivola had promised him protection in return for his confession. *Id.* The Court then noted that at the time of

² The Court noted that at the time of the trial court's ruling, the evidence subsequently determined to be critical in the Arizona Supreme Court's determination of the question of voluntariness had not yet been presented and thus the lower court had not abused its discretion in ruling against Fulminante's motion to suppress. Appendix A to Cert. Pet. at 20-21.

this promise, Sarivola was a paid government informant working for the FBI, who had been dispatched by government agents to "find out more" about Fulminante's involvement in the homicide. *Id.* at 22. The Court determined that Fulminante confessed in response to Sarivola's offer of protection. *Id.* at 22-23.

Given these circumstances, the Court held that Sarivola's promise of protection was "extremely coercive" because of the "obvious" inference that his *life would be in jeopardy* if he did not confess. *Id.* at 19 (emphasis added).

The Court then considered evidence presented by the State that (1) at no time did Fulminante indicate he was in fear, (2) at no time did Fulminante seek Sarivola's "protection", and (3) that Fulminante only spoke to Sarivola in conversational tones. After considering this evidence, the Court found that such was "insufficient to create a *prima facie* establishment of voluntariness by a preponderance of the evidence." *Id.* at 24.

Thus, the Arizona Supreme Court carried out an extensive factual analysis applying the totality of circumstances test and reasonably found the State had failed to carry its burden of proving the confession was "the product of an essentially free and unconstrained choice by its maker." *Schneckloth*, 412 U.S. at 225.

(2) The Supplemental Opinion.

In its supplemental opinion, the Arizona Supreme Court was again unanimous in finding as historical fact "that the confession was obtained as a direct result of *extreme coercion* and was tendered in the belief that *defendant's life was in jeopardy* if he did not confess."³ Appendix C to Cert. Pet. at 9 (emphasis added). The Court concluded "[t]his is a *true coerced confession in every sense of the word*". *Id.* (emphasis added). Again, the Court considered the State's contention that "the coerced confession here is 'at most' a confession obtained surreptitiously through an informant" and rejected

³ The dissent in the supplemental opinion disagreed only on the question of "harmless error". *Id.* at 12.

this argument as being a "mischaracterization of the coerced confession involved in this case." *Id.* at 8.

Thus, the Arizona Supreme Court again carried out an extensive review of the record and unanimously determined from the totality of circumstances presented that the confession was tendered in the belief that defendant's life was in jeopardy if he did not confess and thus resulted from extreme coercion.

(3) The Overbearing of Defendant's Will.

Petitioner and its *amicus* contend that proof of their assertion that the Arizona Supreme Court applied a "but for" test can be found in the fact the Court did not specifically find that the promise of protection did not "overbear" Fulminante's will, thus rendering the confession involuntary. *See Culombe v. Connecticut*, 367 U.S. at 602. This disingenuous argument seeks to place style above substance and urges the Court to presume ignorance of the law on the part of the Arizona Supreme Court.

Initially, the Arizona Supreme Court clearly demonstrated knowledge of the applicable law as is indicated by its repeated references to controlling precedent setting forth such matters as the proper burden of proof to be applied, the totality of circumstances test, and the recognition that forms of coercion short of physical violence can result in a determination of involuntariness. Appendices to Cert. Pet. A at 20, 23, and C at 9. Absent clear evidence to the contrary, this Court should presume the Supreme Court of a sovereign state is familiar with federal law and has proceeded to apply it. *Cf. Irvin v. Dowd*, 359 U.S. 394, 404 (1959); *Ex parte Royall*, 117 U.S. 241, 251 (1886).

Second, by finding as historical fact that this confession resulted from a promise from Sarivola to protect the defendant from the threat of death, the State Supreme Court clearly found, at least by implication, that the threat of death overbore the defendant's will as evidence by his earlier refusal to confess to Sarivola.⁴

⁴ The evidence is uncontradicted that prior to the promise of protection, Fulminante had denied committing the homicide. J. A. at 81.

(4) The Finding of Coercion.

Petitioner's *amicus* contends that the Arizona Supreme Court's opinion relied, in part, upon the proposition that "a confession is involuntary if it is the product of any governmental inducement, even a slight one, made to a suspect to encourage him to confess." *Bram v. United States*, 168 U.S. 532 (1897). The United States then argues the confession here was made in response to, at most, "an inducement, as opposed to some form of coercion." Thus, the United States argues that this Court should hold that the *per se* rule in *Bram* is no longer good law.

This argument is incorrect, however, for it fails to recognize that the predicate for the decision of the Arizona Supreme Court in determining this confession to be involuntary was not "inducement"; rather, it was based upon the Arizona Supreme Court's finding of "extreme coercion". Appendix A to Cert. Pet. at 19, C at 9.

As earlier noted, the Arizona Supreme Court found the historical facts to be that Fulminante's confession directly resulted from Sarivola's promise of protection at a time when the defendant felt his life was in danger. Appendix A to Cert. Pet. at 22-23, C at 9. From this historical fact, the Court reasonably concluded that "[t]his is a true coerced confession in every sense of the word." Appendix C to Cert. Pet. at 9.

Thus, this case does not properly present this Court with the difficult decision of having to consider overruling the promise or inducement language in *Bram*.

(5) The Totality of Circumstances.

As is noted by petitioner, *Miller v. Fenton*, 474 U.S. 104 (1985), stands for the proposition that this Court may make a *de novo* review of the legal question of "voluntariness". See also *Payne v. Arkansas*, 356 U.S. 560 (1958). However, that is not to say that the decision below should be wholly ignored, for as stated by this Court in *Culombe v. Connecticut*:

The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at least, a three-phased process. First, there is the

business of finding the crude historical facts. . . . Second, . . . there is the imaginative recreation, largely inferential, of internal "psychological" fact. Third, there is the application to this psychological fact of standards for judgment informed by . . . rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.

367 U.S. at 603.

Justice Frankfurter, speaking for the Court, further counselled that "[i]n a case coming here from the highest court of a State in which review may be had, the first of these phases is definitely determined, normally, by that court." *Id.* An exception is provided when there are not explicit findings of fact, and in this instance the federal court considers "only the uncontradicted portions of the record: the evidence of the prosecution witnesses and so much of the evidence for the defense as, fairly read . . . remains uncontradicted." *Id.* at 604.

As to the second and third phases, Justice Frankfurter noted that because they are so "inextricably interwoven" and "the apprehension of mental status is almost invariably a matter of induction, more or less imprecise", federal courts may review the determination of voluntariness "[f]or the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially – that is by inference." *Id.* at 605.

However, the Court further counselled, "[g]reat weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate with due regard to federal-state relations that the state court's determination should control." *Id.* See also, *Miller v. Fenton*, 474 U.S. at 112.

As has been previously documented, *supra* at Sections (1) and (2), the Arizona Supreme Court, in its original and supplemental opinions, carried out an extensive factual review of the case and determined from the totality of circumstances that Fulminante's confession directly resulted from Sarivola's promise to protect him from the threat of imminent

death if he confessed.⁵ The court carefully considered all other evidentiary facts advanced by the state and, after applying a totality of the circumstances test, found them to be insufficient to overcome, by a preponderance of the evidence, Fulminante's *prima facie* showing of coercion.

Taking the historical facts found by the Arizona Supreme Court and comparing them to the prior decisions of this Court on the issue of voluntariness, reveals a line of cases wherein confessions have been determined by this Court to be involuntary in similar and, indeed, less compelling circumstances. See, e.g., *Lynumn v. Illinois*, 372 U.S. 528 (1963) (isolated defendant with no experience in criminal law threatened with loss of children and state financial aid); *Spano v. New York*, *supra*, (police officer, childhood friend falsely threatens defendant with loss of job and children); *Haynes v. Washington*, *supra*, (defendant denied use of telephone until he "cooperated"); *Payne v. Arkansas*, *supra*, (sheriff promises to protect defendant from imaginary lynch mob if he confesses). See also, *Blackburn v. Alabama*, 361 U.S. at 206; *Ferguson v. Boyd*, 566 F.2d 873, 877 (4th Cir. 1977).

Further, a review of the record as a whole provides solid evidentiary support for the Arizona Supreme Court's determination of historical facts and logical inferences drawn therefrom. Surely, while one might characterize Fulminante on the "outside" as a middle-aged hardened prisoner whose will would not be easily overborne, the historical facts in this case clearly establish that while inside Raybrook Federal Correctional Institute, he was an isolated, threatened man, alone and distanced from other prisoners, vulnerable to attack 24-hours a day in a location where "a lot of people were thinking of hurting the *little gentleman*". J. A. at 29. (Emphasis added) Under these circumstances, an admitted member of the Columbo crime organization was dispatched by police officers to find out more about his involvement in

⁵ As stated by Sarivola - "No, he would have got out - but it wouldn't have been the way I got out - he would have went out of the prison horizontally." J. A. at 28.

this homicide. J. A. at 24. This individual, under the guise of friendship, offered Fulminante protection from the threat of imminent harm in exchange for his confession. J. A. at 83. Further, the uncontradicted evidence is that prior to the offer of protection by Sarivola, Fulminante had consistently denied that he had committed the crime. J. A. at 81.

Thus, the uncontradicted facts establish that a member of the Columbo crime organization was dispatched by federal officials to make inquiry about Fulminante's involvement in this homicide, that, as was the case in *Spano*, *supra*, the informant used the "ruse" of friendship to ingratiate himself to the defendant⁶ and, as in *Payne v. Arkansas*, *supra*, he used his position and authority in the relevant community to promise the defendant protection from the threat of imminent death. Thus, under the totality of circumstances, the Arizona Supreme Court was correct in finding this to be a "coerced confession in every sense of the word."

In conducting its review of these matters, the National Association of Criminal Defense Lawyers urges this Court to do so in light of the classic admonition of *Boyd v. United States*, 116 U.S. 616, 635 (1885), which held:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

⁶ "An open foe may prove a curse, but a pretended friend is worse." See *Spano*, 360 U.S. at 323 quoting John Gay's famous comment.

II. STARE DECISIS AND BASIC POLICIES UNDERLYING THE REJECTION OF INVOLUNTARY CONFESSIONS MANDATE AUTOMATIC REVERSAL OF A CONVICTION PREDICATED ON THE ERRONEOUS ADMISSION OF A COERCED CONFESSION BECAUSE THE USE OF SUCH CONFESSION CAN NEVER BE HARMLESS ERROR.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court rejected the argument that "all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." *Id.* at 21. The Court recognized that in the context of a particular case, certain errors have little, if any, likelihood of affecting the jury's verdict. Since *Chapman*, the Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing Court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Harmless error doctrine has been applied to a number of constitutional errors. *E.g.*, *id.* at 684 (failure to permit cross-examination concerning witness bias); *Rushen v. Spain*, 464 U.S. 114 (1983) (*per curiam*) (denial of right to be present at trial); *United States v. Hastings*, 461 U.S. 499 (1983) (improper comment on defendant's failure to testify); *Moore v. Illinois*, 434 U.S. 220 (1977) (admission of witness identification obtained in violation of right to counsel); *Milton v. Wainwright*, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel); *Harrington v. California*, 395 U.S. 250 (1969) (admission of non-testifying co-defendant's statement).

Use of the harmless error standard reflects a judgment that the primary purpose of a criminal trial is the question of the defendant's guilt or innocence. *See United States v. Nobles*, 422 U.S. 225, 230 (1975). It "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdall*, 475 U.S.

at 681. Accordingly, the inquiry in cases in which the harmless error test applies is whether "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." *Schneble v. Florida*, 405 U.S. 472, 432 (1972).

Despite the significant interests that support the harmless error doctrine, this Court has recognized a group of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. at 23. These rights constitute fundamental protections, without which a criminal trial can not reliably serve as an impartial forum for the determination of guilt or innocence. *Rose v. Clark*, 478 U.S. at 577-78. This group consists of errors that "either abort the basic trial process . . . or deny it altogether." *Id.* at n. 6. Consistently identified as being within the core of this group of fundamental rights requiring automatic reversal has been the use of a coerced confession. *Chapman v. California*, 386 U.S. at 23 and n. 8; *Lego v. Twomey*, 404 U.S. at 483; *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *New Jersey v. Portash*, 440 U.S. 450 (1979); *Rose v. Clark*, 478 U.S. at 577, n. 6. The question in this case is whether any compelling reason exists to overturn and reverse this long-standing rule regarding the inapplicability of harmless error doctrine in involuntary confession cases.

For years prior to *Chapman*, this Court unequivocally held prosecutorial use of involuntary statements could never constitute harmless error. *Bram v. United States*, *supra*; *Malinski v. New York*, 324 U.S. 401 (1945); *Stroble v. California*, 343 U.S. 181 (1952); *Payne v. Arkansas*, 356 U.S. at 567-68; *Spano v. New York*, 360 U.S. at 324; *Blackburn v. Alabama*, 361 U.S. at 206; *Rogers v. Richmond*, 365 U.S. at 541; *Lynum v. Illinois*, 372 U.S. at 537; *Haynes v. Washington*, 373 U.S. at 518-19. And, the Court's opinions make it absolutely clear that no matter how sufficient the evidence aside from the confession, the harmless error doctrine is inapplicable. *Jackson v. Denno*, 378 U.S. at 376 (use of defendant's involuntary statement is a denial of due process of law "even though there is ample evidence aside from the confession to support the conviction"); *Payne v. Arkansas*, 356 U.S. at 568

("this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."). In fact, this Court has strictly adhered to this principle even in cases where other proper confessions by the defendant have been admitted into evidence. *See, e.g., Haynes v. Washington, supra* (evidence included two prior admissible confessions by the defendant as well as an eyewitness identification of the defendant); *Malinski v. New York, supra* (defendant made confessions to his girlfriend, brother-in-law and to a friend); *Stroble v. California, supra* (five proper confessions of the defendant admitted into evidence in addition to defendant's involuntary statement); *Spano v. New York, supra*; *Payne v. Arkansas, supra*.

Despite this unyielding line of authority prior to *Chapman*, and the consistent, unambiguous citation to the proposition that involuntary statements erroneously admitted at trial can never be harmless error after *Chapman*, *see* cases cited *supra* at 15,⁷ petitioner argues developments in the harmless error doctrine have rendered obsolete the rule of reversal set forth in all of the Court's prior cases. Petitioner claims that admission of a coerced confession is the type of common evidentiary error that readily lends itself to harmless error analysis. *See* Petitioner's Brief at 10. In addition, Petitioner

⁷ Petitioner and the dissenting opinion in the Arizona Supreme Court's supplemental opinion in this matter cite *Milton v. Wainright*, 407 U.S. 371 (1972), to support the proposition that harmless error analysis applies to non-egregious coerced confession cases. However, the fact is that *Milton* was decided under and is best understood as a Sixth Amendment case. *See Satterwhite v. Texas*, 486 U.S. 249, ___, 100 L. Ed. 2d 284, 294 (1988); *Rose v. Clark*, 478 U.S. at 576; *United States v. Murphy*, 763 F.2d 202, 208, n. 8 (6th Cir. 1985); *Cahill v. Rushen*, 501 F.Supp. 1219, 1231 n. 17 (E.D. Cal. 1980), *aff'd* 678 F.2d 791 (9th Cir. 1982). *See also* Brief for the United States at 19 n. 16.

claims that concerns about the reliability of coerced confessions and their effect on jurors do not warrant exempting the erroneous admission of a coerced confession from harmless error analysis and neither is it relevant that the admission of a coerced confession may have the appearance and effect of denying a defendant his right to a fair trial. *Id.* Finally, Petitioner claims that application of harmless error analysis to involuntary confessions is totally consistent with the purpose of criminal trials, to determine guilt or innocence. *Id.*

Unfortunately for Petitioner, its argument is fatally flawed for three reasons: (1) it disregards fundamental principles of *stare decisis*; (2) admission of involuntary confessions, given their unreliability and overwhelming evidentiary effect on most jurors, represents a paradigm of the type of constitutional error that is intrinsically harmful *per se*; and (3) the policies underlying harmless error analysis are neither fostered nor enhanced by review of convictions predicated on the use of involuntary confessions.

A. *Stare Decisis* Precludes a Change in the Law Absent Compelling Reasons Which Do Not Exist in This Case.

The Court has stated repeatedly, and with great emphasis, that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welsh v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 494 (1987). Although *stare decisis* is a principle of policy and not a doctrine forever designed to preclude a change in the law, the rule of law depends in large part on adherence to this doctrine. Indeed, the doctrine is "'a natural evolution from the very nature of our institutions.'" *Id.* at 479 quoting Lile, *Some Views on the Rule of Stare Decisis*, 4 Va.L.Rev. 95, 97 (1916). In essence, *stare decisis* is a "basic self-governing principle within the Judicial Branch which is intrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion' ". *Patterson v. McLean Credit Union*, ___, U.S. ___, 105 L.Ed.2d 132, 147 (1989) quoting *The Federalist*, No. 78 p. 490 (H. Lodge Ed. 1888) (A. Hamilton). *See also*

Vasquez v. Hillery, 474 U.S. 254, 265 (1986) (*stare decisis* insures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").

Given the fundamental nature of the doctrine of *stare decisis* in a legal system where stability, predictability and finality are, of necessity, paramount goals, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Thus, even though the doctrine is not as rigidly observed in constitutional cases as in matters of statutory interpretation, this Court has stated

We should not be . . . unmindful, even when constitutional questions are involved, of the principle of *stare decisis* by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us.

Green v. United States, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting) cited in *Welsh v. Department of Highways and Public Transportation*, 483 U.S. at 479.

Strictly following the above principles, this Court has overruled prior decisions only when the necessity and propriety of doing so has been established by compelling evidence. See *Patterson v. McLean Credit Union*, 485 U.S. 617, 617-18 (1988) (citing cases); *Vasquez v. Hillery*, 474 U.S. at 266. The party advocating the abandonment of an established precedent bears the heavy burden of establishing the articulable reasons necessary for any detour from the straight path of *stare decisis*. *Id.*

In the case at bar, neither the petitioner nor its *amicus* have shown any special justification for overruling ninety years of precedent in this Court holding involuntary confessions not subject to harmless error. As a starting point, and perhaps an ending point, unlike the changes that have occurred during the same span of time in constitutional jurisprudence regarding the Fourth and Sixth Amendments, the law regarding involuntary confessions has not changed since

it was first established in *Bram v. United States*, *supra*. A coerced confession, whether that coercion is physical or psychological, remains an involuntary confession and an involuntary confession remains inadmissible at trial as a violation of due process of law. The policies undergirding this axiom of law remain as they have always been:

It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in the manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," . . .

Jackson v. Denno, 378 U.S. at 385 quoting, *Blackburn v. Alabama*, 361 U.S. at 206-07. No intervening development of the law since the law of involuntary confessions was originally stated has removed or weakened the conceptual underpinnings of this Court's prior decisions in this area. Cf. *Patterson v. McLean Credit Union*, ___ U.S. at ___, 105 L.Ed.2d at 148.

Neither has later law rendered this Court's decisions in *Bram*, *Malinski*, *Spano*, *Payne* and its progeny irreconcilable with competing legal doctrines or policies. Amicus for Petitioner claims that developments in the harmless error doctrine since *Bram* have rendered obsolete the rule of *per se* reversal set forth in that case. See Brief for the United States at 17. Yet, amicus is simply unable to explain why this Court, in a number of cases since the development of the harmless error doctrine under *Chapman*, has continued to cite as one of the main exceptions to the harmless error doctrine, the use of an involuntary confession at trial. See *Lego v. Twomey*, 404 U.S. at 485; *Mincey v. Arizona*, 437 at 398; *Connecticut v. Johnson*, 460 U.S. 73, 81 (1983); *Rose v. Clark*, 478 U.S. at 578, n. 6.

Furthermore, despite the fact that harmless error principles have been held applicable to a broad range of errors in various constitutional arenas, see *Delaware v. Van Arsdall*,

475 U.S. at 681, claims of constitutional error are simply not fungible. There are some errors so fundamental that they fatally infect the validity of any underlying judgment and destroy the integrity of the process by which that judgment was obtained. Among these errors, as Justice Stevens pointed out in his dissenting opinion in *Rose v. Lundy*, 455 U.S. 509, 544 (1982), are convictions obtained on the basis of involuntary confessions. As this Court has repeatedly held, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. at 23 n. 8.

Finally, it seems more than a little disingenuous to argue that the harmless error doctrine has somehow overruled *Bram* and its progeny when the seminal case enunciating the doctrine, *Chapman v. California*, specifically cites the use of coerced confessions as a paradigm of those constitutional rights so fundamental to a fair trial that their infraction can never be harmless.

Another traditional justification for overruling precedent is that the prior cases may be a "positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision . . . or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws." *Patterson v. McLean Credit Union*, ___ U.S. at ___, 105 L. Ed. 2d at 148. Again, neither petitioner nor its *amicus* have pointed to any inconsistency in the law regarding the use of involuntary confessions and neither can they credibly show any institutional incompetence in determining the issue of whether a confession has been coerced and, if it has been, the necessity for reversal of the underlying conviction. In fact, the bright line rule which now exists of *per se* reversal of those cases predicated on the use of an involuntary confession renders the job of every actor in the criminal justice system a bit easier by providing predictability and stability in that area of the law. As constitutional jurisprudence now stands, if an involuntary confession is used at a defendant's trial, his conviction is subject to immediate reversal. Prolonged litigation over what role the involuntary confession played at trial is avoided

and deterrence, in terms of the use of such confessions, remains at a maximum. Nothing in this record suggests that the rule, as it exists, is unworkable or confusing.

Nor, is there any empirical evidence suggesting that the *per se* rule of barring coerced confessions poses a direct obstacle to the realization of other important legal objectives. Obviously, the reversal of convictions in which involuntary confessions have been admitted entails substantial social costs. "[I]t forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already taken place; victims may be asked to relive their disturbing experiences." *United States v. Mechanik*, 475 U.S. 66, 72 (1986). In addition, the passage of time and the erosion of memory may render retrial difficult, if not impossible, and on a rare occasion, may reward the accused with complete freedom from prosecution. There is no gainsaying that these are substantial costs society bears whenever a retrial is ordered. *Id.*

However, given the fundamental nature of the right involved, this Court has emphasized that the Constitution and our criminal justice system protect values besides the reliability and necessity of the guilt-innocence determination. See *Rose v. Clark*, 478 U.S. at 588 (Stevens, J., concurring in judgment). The use of a coerced confession renders the basic trial process fundamentally unfair regardless of the evidence of guilt. Furthermore, the application of harmless error in this area of police investigation would have a coercive impact on the administration of criminal justice. Given the settings in which interrogations often occur, an automatic application of harmless error review in involuntary confession cases will only encourage prosecutors and law enforcement officials to "subordinate the interest in respecting the Constitution to the ever present and always powerful interest in obtaining a conviction in a particular case." *Id.* at 588-589. In the end, society's legitimate concern for punishing crime cannot be effected "without heeding the mode by which it is accomplished." *Connecticut v. Johnson*, 460 U.S. at 86 quoting *Bollenbach v. United States*, 326 U.S. 607, 614-15. "It is a

truism that constitutional protections have costs." *Coy v. Iowa*, 487 U.S. ___, ___, 101 L. Ed. 2d 857, 866 (1988).

Finally, this Court has suggested that sometimes a precedent becomes more vulnerable as it becomes outdated. *Patterson v. McLean Credit Union*, ___ U.S. ___, 105 L. Ed. 2d at 149.⁸ However, in this case, petitioner can cite to no decision of this Court questioning in any manner the *per se* reversal rule regarding the use of involuntary confessions first enunciated by this Court in 1897 in *Bram v. United States*. In the area of involuntary confessions, this Court has not simply held those confessions to be unconstitutional; rather the opinions of this Court repeatedly refer to the "abhorrence of society to the use of involuntary confessions". *Spano v. New York*, 360 U.S. at 320. Abhorrence to a particular notion does not overnight transform into acceptance. At a minimum, it can safely be said that the principles enunciated in *Spano* and all of the cases since are not inconsistent with the sense of justice or social welfare prevailing in this nation. Accordingly, whether this Court's view that involuntary confessions are never subject to harmless error analysis is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country. *Cf. Patterson v. McLean Credit Union*, ___ U.S. at ___, 105 L. Ed. 2d at 149.

B. The Policies Underlying Suppression of Involuntary Confessions Likewise Strongly Militate Against Application of the Harmless Error Doctrine to Such Cases.

A number of the policies underlying this Court's repeated holdings that the erroneous admission in evidence of a coerced confession at a state criminal trial violates the Due Process Clause of the Fourteenth Amendment establish the

⁸ A strong contrary argument can be and has been made that "the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity." *South Carolina v. Gathers*, 490 U.S. ___, ___, 104 L. Ed. 2d 876, 892 (1989) (Scalia, J., dissenting).

inapplicability of harmless error analysis to this constitutional deprivation. To begin with, as this Court stated in *Stein v. New York*, 346 U.S. 156, 192 (1953):

[R]eliance on a coerced confession vitiates a conviction because such a confession combines with the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A beaten confession is a false foundation for any conviction

Obviously, a coerced confession, by definition one in which the declarant has not exercised his free will and is under psychological or physical duress aimed at forcing the declarant to make a statement with only one conclusion, hardly bears substantial indicia of trustworthiness and reliability. Indeed, the admission of coerced confessions creates a substantial risk that false testimony will be admitted and an innocent person convicted on that basis. A judgment under such circumstances can never be allowed to stand.

However, an unholy reliance on false confessions is not the dominant reason the Fourteenth Amendment forbids the use of involuntary confessions. Clearly, determining whether a confession is involuntary does not turn on its truth or falsity. *Lego v. Twomey*, 404 U.S. at 484-85; *Rogers v. Richmond*, 365 U.S. at 540-41. Rather, the primary predicate for suppressing involuntary confessions and vitiating convictions based on such statements is the twin concern of the overwhelming evidentiary effect of such confessions on a jury and the forbidden methods used by government officials to extract them. *Id.* This Court has unequivocally stated that, while a statement taken in violation of *Miranda* can be used for impeachment purposes, one taken in violation of the right of compulsory self-incrimination can not be so used. *New Jersey v. Portash*, 440 U.S. at 459. Although both involve the Fifth Amendment, the inquiry in each case is distinct. "By prohibiting further interrogation after the invocation of [Miranda] rights, [this Court has] erect[ed] an auxiliary barrier against police coercion." *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987). In *Miranda* cases, the inquiry is whether an individual

has voluntarily, knowingly and intelligently waived his constitutional right to remain silent while in custody. *Colorado v. Spring*, 479 U.S. 564 (1987).

In involuntary confession cases, on the other hand, the focus is whether the confession is the product of a choice which is free from overbearing coercion by government actors. See *Colorado v. Connelly*, *supra*. Given that a "defendant's own confession is probably the most probative and damaging evidence that can be admitted against him," *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White J. dissenting), it is difficult to conclude with any assurance that a confession does not have a substantial impact on a jury. *United States v. Janoe*, 720 F.2d 1156, 1165 (10th Cir 1983), *cert. denied*, 465 U.S. 1036 (1984). Indeed, as this Court stated in *Payne v. Arkansas*, 356 U.S. at 568, "no one can say what credit and weight the jury [will give] to the confession."

As the United States concedes in its *amicus* brief, "[s]ince a defendant's confession is extremely powerful evidence that is likely to be prejudicial in most cases, . . . it is reasonable and efficient to adopt a rule of automatic reversal." Brief of the United States at 24. However, the United States argues that although the erroneous admission of a defendant's confession will often be prejudicial, it does not follow that the admission of the confession can *never* be harmless. *Id.* The government further claims that although the "uniquely powerful impact" of most confession evidence means the government will often be unable to carry its burden of establishing harmless error, that is no reason to adopt a rule barring the government from ever making that showing. *Id.* Indeed, the government opines that substantial additional evidence of guilt, including other confessions, may in some cases give rise to a case of harmless error. *Id.*

The problem with this argument by the government is two fold. First, it totally rejects the unbroken line of cases in this Court which have held that where a coerced confession is admitted at trial, it is irrelevant if substantial additional evidence, including other properly admitted confessions, exists to substantiate the conviction. *E.g.*, *Haynes v. Washington*, *supra*; *Malinski v. New York*, *supra*; *Stroble v. California*,

supra; *Spano v. New York*, *supra*; *Payne v. Arkansas*, *supra*. All of these cases contained substantial evidence of the defendant's guilt independent of the involuntary confession, yet the Court found in each case that the admission in evidence, over objection, of a coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.

Second, and more important, the right against compulsory self-incrimination is so basic to a fair trial that its abrogation should never be deemed as harmless. Coerced confessions are inadmissible, not only because they are unreliable and because the jury attaches great weight to the statement of a defendant, but because due process forbids the police from using interrogation techniques "offensive to a civilized system of justice." *Miller v. Fenton*, 474 U.S. at 109. See also *Jackson v. Denno*, 378 U.S. at 386. In the end, coerced confessions are objectionable on a plain higher than any other constitutional violation heretofore considered as appropriate for harmless error analysis because the extraction of such statements from the defendant "offend[s] an underlying principle in the enforcement of our criminal law:

that ours is an accusatorial and not inquisitorial system – a system in which the state must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of its own mouth.

Rogers v. Richmond, 365 U.S. at 541.

Thus, harmless error inquiry remains inappropriate for certain constitutional violations no matter how strong the evidence of guilt may be. Violations of certain constitutional rights, like involuntary confessions, can never be the subject of harmless error analysis because those rights protect values of paramount importance unrelated to the truth seeking function of trial. See *Rose v. Clark*, 478 U.S. at 587 (Stevens, J. concurring in judgment). Our society does not take lightly the violation by law enforcement officers of the defendant's right to counsel before interrogation or the failure to provide a defendant with *Miranda* warnings prior to interrogation. However, disdain for such police tactics hardly compares on a

constitutional scale of values with the "abhorrence of society to the use of involuntary confessions." *Spano v. New York*, 360 U.S. at 320.⁹

Accordingly, because the use of involuntary confessions "abort[s] the basic trial process", *Rose v. Clark*, 478 U.S. at 578, n. 6, this Court should continue to adhere to its long-standing doctrine that admission of involuntary confessions can never constitute harmless error.

III. ASSUMING ARGUENDO, THAT HARMLESS ERROR ANALYSIS APPLIES TO INVOLUNTARY CONFESSION CASES, INTRODUCTION OF RESPONDENT'S COERCED CONFESSION DID NOT CONSTITUTE HARMLESS ERROR.

In order to conclude that a defendant was not prejudiced by federal constitutional error, a reviewing court must be able to declare that the violation was "harmless beyond a reasonable doubt." *Chapman v. California*, 368 U.S. at 24. Thus, assuming *arguendo* that harmless error analysis applies to this case, the decision of the Supreme Court of Arizona can be reversed only if this Court finds the record developed at trial, minus the Raybrook confession, establishes respondent's guilt beyond a reasonable doubt. *See Rose v. Clark*, 438 U.S. at 583. Once a petitioner establishes the infringement of a constitutional right, as at bar, the burden shifts to the state to establish the error was harmless. *Hawkins v. LeFevre*, 758 F.2d 866, 877, n. 15 (2nd Cir. 1985); *Scarborough v. Alexander*, 531 F.2d 959, 962 (9th Cir. 1976). By its own words at trial and on appeal, this the State of Arizona is unable to do.

⁹ Both the Petitioner and amicus for petitioner strenuously attempt to distinguish this Court's prior cases on the basis of physical coercion verses other types of coercion. Such a distinction simply does not exist. As this Court has repeatedly held, coercion is coercion, whether the interrogation technique be physical or psychological. *See Oregon v. Elstad*, 470 U.S. 298, 312 (1985) (implicitly recognizing coercion may exist when police use any deliberate means calculated to break the suspect's will," even absent physical violence or impairment); *Lynum v. Illinois*, *supra*; *Blackburn v. Alabama*, *supra*.

Harmless error analysis often requires extensive review of the record to determine whether or not, excluding the challenged evidence, sufficient evidence remains to convince a court that the constitutional error was harmless beyond a reasonable doubt. However, even a cursory review of the record in this case, particularly the comments of two of the key actors in the criminal justice system with respect to respondent's trial, the prosecutor and the trial judge, easily answers the harmless error inquiry in this matter.

After the start of trial, during a hearing set to consider the respondent's Motion for Reconsideration on Motion to Suppress, the trial court stated as follows:

You know, I think from what little I know about this trial, the character of this man [Sarivola] for truthfulness or untruthfulness and his credibility is the centerpiece of this case, is it not?

Mr. Scull [prosecutor]: It's very important, there's no doubt.

J.A. 62.

Since Sarivola's only purpose in testifying was introduction of the respondent's confession that has been deemed involuntary, it is clear the trial court, the court closest to the fact-finding jurors, believed respondent's confession and the credibility of the man who obtained the alleged confession were critical pieces of evidence in the trial of this case. The trial court clearly considered Sarivola's credibility, and therefore the credibility of his testimony regarding respondent's confession, as the heart of respondent's trial. Indeed, most, if not all, of Sarivola's testimony is irrelevant if the prison confession is inadmissible. In short, the trial court's comments on what it deemed to be the dispositive witness and evidence in the case answers the inquiry of how important the alleged confession obtained at Raybrook was in this case.

Second, the victim in this matter died on September 13, 1982. The indictment against Fulminante was not filed until September 4, 1984. (J. A. 2) It is highly unlikely that the prosecution would have delayed filing charges during that two year time frame if it felt it had sufficient evidence to indict. In point of fact, the indictment was not filed until after the

alleged confessions to Sarivola and his wife. The conclusion which logically follows from this time frame is that the prosecution did not feel it could make its case in the absence of the confessions. Indeed, the prosecutor conceded this point in his opening statement at trial. After reviewing the evidence the state intended to present at trial, the prosecutor argued:

[B]ut what brings us to Court, what makes this case fileable and prosecutable and triable is that later, Mr. Fulminante confesses this crime to Anthony Sarivola and later, to Donna Sarivola, his wife.

J. A. 65-66. Furthermore, in its answering brief filed with the Arizona Supreme Court, the State of Arizona conceded that prior to the confessions, although the police suspected Fulminante of murdering his stepdaughter, they did not have enough evidence to charge him (J. A. 193). These prosecutorial concessions, both at trial and on appeal, establish the critical nature of the respondents' confession to Anthony Sarivola in this case. Given the extreme credibility problems plaguing Donna Sarivola's testimony, *see, e.g.*, J. A. 172-75, it is impossible to say that the admission of respondent's first confession constituted harmless error. "Triers of fact accord confessions such heavy weight in their determinations that 'the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.'" *Colorado v. Connelly*, 479 U.S. at 182 (Brennan, J., dissenting) quoting *E. Clearly McCormick On Evidence*, 816 (2d Ed. 1972). As with the confession in this case to Sarivola, no other class of evidence is so profoundly prejudicial. 479 U.S. at 182 citing *Saltzburg, Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 271, 293 (1975).

Third, due to the erroneous admission of respondent's alleged confession to informant Sarivola, a number of pieces of irrelevant evidence were admitted and allowed to permeate the trial record, including, *inter alia*: Fulminante's prior felony convictions, his being sent to prison on two separate occasions, his reputation within the prison for being untruthful, and his association with a member of an organized crime

family. If the confession to Sarivola had been properly suppressed, these items of evidence would have been inadmissible under Arizona law. *See, e.g.*, *State v. Holsinger*, 124 Ariz. 18, 601 P.2d 1054 (1979); *State v. Ballantyne*, 128 Ariz. 68, 623 P.2d 857 (Ct. App. 1981).

Finally, although the Joint Appendix in this case does not contain all of the trial record, particularly the closing arguments of counsel, the Appendix does contain repeated references at trial to respondent's alleged confession to Anthony Sarivola. Further, it defies logic to believe that the prosecutor did not make emphatic reference to this confession in his summation. Indeed, given how important respondent's confession to Sarivola was, even in obtaining an indictment, the confession was hardly insulated from the trial. *See Malinski v. New York*, 394 U.S. at 409-10. Under these circumstances, where the entire trial largely focused on the confessions to the Sarivolas', no reviewing court can state with any degree of confidence that in this capital case the jury's verdict was not substantially effected by the coerced confession and that, excluding the Raybrook confession, evidence to prove guilt beyond a reasonable doubt assuredly remains.

CONCLUSION

The judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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MOTION FILED

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No. 89-839

In The
Supreme Court of the United States
October Term, 1989

STATE OF ARIZONA,
Petitioner,

--against--

ORESTE C. FULMINANTE,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF ARIZONA

MOTION TO FILE BRIEF
AND
BRIEF AMICI CURIAE OF
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE NATIONAL DISTRICT
ATTORNEYS ASSOCIATION, INC.,
THE NATIONAL SHERIFFS' ASSOCIATION, INC.,
AND THE LINCOLN LEGAL FOUNDATION,
IN SUPPORT OF THE PETITIONER.

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IN SUPPORT OF THE PETITIONER.

This motion and brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner. As of the time of the printing of this motion and brief, consent ~~has not been received~~ ^{has refused} from the Respondent. The letter of Consent of Petitioner has been filed with the Clerk of this Court, as required by the Rules.

Come now *Americans for Effective Law Enforcement, Inc., et al.*, and move this Court for leave to file the attached brief as *amici curiae*, and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States, and thirty-eight times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time

protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association Inc. (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The Lincoln Legal Foundation (LLF) is a national, nonprofit, nonpartisan, public-interest law center which undertakes litigation, administrative proceedings, legal studies, and educational activities in matters promoting political, economic, and civil liberties; preserving constitutional government, including the separation and limitation of governmental powers; and defending the rights of innocent victims of crime.

2. *Desirability of an Amici Curiae Brief.* *Amici* are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of adopting and implementing guidelines for the conduct of interrogations; (2)

prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby; and (3) members of the business and professional communities devoted to the goal of effective law enforcement.

Because of the relationship with our members, and the composition of our membership and directors -- including active law enforcement administrators and counsel at the state and national level -- we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, NDAA, NSA, and LLF are state and national associations, and their perspective is broad. This brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding police conduct in the law of interrogation. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the facts of this case and has conferred at length with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received and filed with the Clerk of

this Court. This Motion is necessary because the Respondent has not as of the time of printing of the Brief granted consent to *amici* in writing. Should it be received thereafter, it will be filed by counsel with the Clerk of this Court with a request that this motion be withdrawn and the brief be deemed filed with the consent of all parties.

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF AMICI

See Section on Identity and Interest of *Amici Curiae*, *supra*.

STATEMENT OF FACTS

The facts, as stated in the Arizona court's opinion, *State v. Fulminante*, 161 Ariz. 237, 778 P.2d 602 (1988), revealed that the respondent-inmate (hereinafter referred to as "defendant") had been a suspect in the killing of his step-daughter, but no charges had been filed against him.

While the defendant was in a New York prison on a weapon's possession conviction, he became friends with another inmate, Anthony Sarivola, who was serving a 60 day sentence for extortion. Sarivola, with an organized crime background, had become an F.B.I. informer; and while in prison, he was posing as an organized crime figure.

After Sarivola and the defendant became friends, Sarivola heard a rumor that the defendant had been suspected of killing a child. This the defendant denied, but the rumor was passed on to Sarivola's F.B.I. contact, who instructed Sarivola to find out more about it.

According to Sarivola, defendant had been receiving "rough" treatment from other inmates because of the rumor, so Sarivola suggested to the defendant that if defendant told Sarivola the truth he would "give him help." Defendant then admitted the child killing and supplied details about it.

Sarivola was released from prison in November, 1983; defendant was released in May, 1984. Sarivola and his fiancée, Donna, picked up defendant at a local bus stop

and he was asked if he had any relatives he wished to see, whereupon defendant said he couldn't return home because he had killed a little girl in Arizona. They then drove defendant to a friend's house in Pennsylvania. Later he was arrested in New York on another weapon's possession charge.

Upon indictment for the child murder, defendant sought to suppress the statements he had made to Sarivola, and to him and Donna. Suppression was denied, defendant was found guilty, and he was sentenced to death. He appealed.

Initially the Arizona Supreme Court affirmed the conviction and sentence, 161 Ariz. 237, 778 P.2d 602 (1988). Then, in a "supplemental opinion," 778 P.2d at 626, three of the five Justices vacated the conviction and remanded the case for retrial without the use of "the original coerced confession" made while in prison. (One of the Justices did not participate in the supplemental ruling; another had retired before the supplemental opinion was rendered. The remaining Justice dissented).

In its first opinion, the Arizona Supreme Court had held that while the defendant's confession to Sarivola was inadmissible as evidence because of its coercive nature, the second one was not the fruit of the poisonous tree and consequently had been properly admitted. The erroneous admission of the first confession, though a "coerced" one, was considered harmless error. However, in the supplemental opinion, the court reversed its position, deciding that the harmless error doctrine could not be applied to a coerced confession.

The dissenting Justice Cameron, 778 P.2d at 628, contended that the harmless error doctrine was applicable to involuntary confessions, and not just to *Miranda*-flawed ones. He was of the view that the federal

cases upon which the majority now relied were "not sound authority for its ruling." 778 P.2d at 628. He stated that only three of the cited cases were of any relevance. They were ones that involved confessions obtained by the police under circumstances "that resulted in the defendant being in a weakened, vulnerable physical condition and the police using coercive pressure through intensive interrogation to elicit a confession." 778 P.2d at 629. According to Justice Cameron, the police tactics in those cases violated due process of law and, therefore, mandated rejection or usage "in any way" against a defendant.

ARGUMENT

I. DEFENDANT'S CONFESSION WAS NOT COERCED; THE PROMISE MADE TO HIM BY A FELLOW PENITENTIARY INMATE (A GOVERNMENT INFORMER) DID NOT PRESENT "A SUBSTANTIAL RISK OF A FALSE CONFESSION." IT CONSISTED OF A STATEMENT THAT THE INMATE WOULD PROTECT DEFENDANT FROM OTHER PRISONERS WHO SUPPOSEDLY HAD BEEN GIVING HIM "ROUGH" TREATMENT BECAUSE OF A RUMOR THAT DEFENDANT HAD KILLED A CHILD.

II. EVEN IF THE CONFESSION HAD BEEN COERCED BY THE INFORMER'S PROMISE, ITS ADMISSION INTO EVIDENCE AT THE CHILD MURDER TRIAL WOULD HAVE CONSTITUTED HARMLESS ERROR, BECAUSE THE TOTALITY OF CIRCUMSTANCES ESTABLISHED OVERWHELMING EVIDENCE OF GUILT.

Amici will not discuss at length the case law analysis of the Petitioner State of Arizona in this case, although we agree with that analysis. Instead, we will concentrate upon policy issues raised by this case and our need as law enforcement administrators and concerned members of Society to ensure that law enforcement officers have sufficient guidance in the area of permissible interrogation techniques.

We note, initially, that promises *per se* do not categorically nullify a confession. A clear example, and a generally accepted one, is a promise of secrecy, as, for instance, one made to a suspect who requests that his mother not be told of his criminal act. (Actually, a promise of such secrecy affords added assurance of truthfulness.) Other promises that are treated in a

similar fashion are promises to recommend light bail, or a promise to seek psychiatric treatment after the suspect's incarceration. Core references and a general discussion of the legal effects of promises may be found in Inbau, Reid, and Buckley, *Criminal Interrogation and Confession*, (3d ed. 1986) at pp. 214, 315-318. Also, as regards such promises as psychiatric help, see *Miller v. Fenton*, 796 F.2d 598 (3rd Cir. 1986), in which the court held that this kind of promise did not produce "psychological pressure strong enough to overbear the [defendant's] will." (p. 613)

Amici suggest to this Court that the best and fairest test regarding promises is in a New York statute: Does the promise present a "substantial risk" of a false confession. Article 60.45, *Criminal Procedure Law*, Book 11-A, McKinney's Consolidated Laws of New York. Such a test also has the merit of giving the police reasonably clear guidance in this area of interrogation.

In the instant case the defendant never expressed to the prison guards or its officials that he had any fear of harm from other inmates. He knew only what the informer told him about a "rumor" within the prison. This information, and a promise to give him help, presented no "substantial risk" of the defendant making a false confession.

The confession the defendant made after his release from prison was considered by the lower courts to be voluntary and free from any taint of the original one. It, therefore, presents no problem to this Court.

With regard to the "harmless error" issue, the discussion in the dissenting opinion of Justice Cameron clearly supports the position that the doctrine applies to involuntary confessions as well as to *Miranda*-flawed ones. He points out that the decisions of this Court

holding the "harmless error" rule inapplicable to involuntary confessions all involved egregious police conduct that amounted to a violation of due process. And in *Milton v. Wainwright*, 407 U.S. 371 (1972), this Court actually applied a harmless error analysis in a claim by a habeas corpus petitioner that his confession was involuntary as well as being in violation of the Sixth Amendment right to counsel. Other courts have followed the lead of *Milton* in applying a harmless error analysis to claims of involuntary confessions. *E.g.*, *United States v. Carter*, 804 F.2d 487 (8th Cir. 1986); *Harrison v. Owen*, 682 F.2d 138 (7th Cir. 1982); *State v. Childs*, 430 N.W.2d 353 (Wis. App. 1988); *State v. Dean*, 363 S.E.2d 467 (W.Va. 1987); *Hinshaw v. State*, 398 So. 2d 762 (Ala. 1981). *See also*, *Meade v. Cox*, 438 F.2d 323 (4th Cir. 1971); *United States ex rel. Moore v. Follette*, 425 F.2d 925 (2d Cir. 1970), *cert. denied*, 398 U.S. 966; *People v. Ferkins*, 116 A.D.2d 760, 497 N.Y.S.2d 159 (1986); *State v. Casteneda*, 150 Ariz. 382, 724 P.2d 1 (1986); *Kelley v. State*, 470 N.E.2d 1322 (Ind. 1984); *State v. Johnson*, 35 Wash. App. 380, 666 P.2d 950 (1983); *People v. Gibson*, 109 Ill. App. 3d 316, 440 N.E.2d 339 (1982).

One of the recent federal cases, in which this Court denied certiorari, is *United States v. Murphy and Stauffer*, 763 F.2d 202 (6th Cir. 1985), *cert. denied*, 474 U.S. 1063. In *Murphy* the defendant made incriminating statements while he was being apprehended by an attacking police dog but without police misconduct or interrogation. The Circuit Court ruled the statements were inadmissible as evidence, but the admission of them was harmless error in view of the overwhelming evidence of guilt.

The decisions in *Milton* and subsequent cases are adequately supportive of the applicability of the harmless error doctrine in involuntary confession case situations. This rule is necessary to assure that all segments of the criminal justice system--from police to courts--have

adequate and reasonable guidance on the topic. The police, in particular, while not desirous of ever violating the constitutional rights of interrogated suspects, must have some guidance to the effect that good faith violations of highly technical rules will be subjected to reasonable rules of admissibility and trial error. The "harmless error" rule as applied broadly to confessions is such a reasonable rule.

CONCLUSION

In the absence of egregious police conduct that would come within the orbit of violations of due process, *amici* urge this Court to reverse the ruling of the court below and hold that the admission of defendant's original confession was (a) properly admitted in evidence, or (b) even if it were considered inadmissible, its admission was harmless error. We most certainly share Justice Cameron's view that the costs of applying the exclusionary rule in this case should not be ignored. "[C]onsidering the costs and benefits," he stated, the costs are too great and the benefits negligible.

Respectfully submitted,

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